

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDERAL TRADE COMMISSION

v.

WALTER E. CROWTHER,
Vice President and Secretary
Louisville Cement Company,
Appellant,

No. 23924

WILLIAM L. LUCAS,
Secretary and Treasurer,
Martin Marietta Corporation,
Appellant,

No. 23925

GENERAL PORTLAND CEMENT
COMPANY,
Appellant,

No. 23926

WORTH LOOMIS,
Vice President-Administration
And Secretary,
Medusa Portland Cement Company,
Appellant,

No. 23927

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 25 1970

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Relevant Document Entries*

1969

- Oct. 3 -- Filed: Petition for an Order Requiring Respondent to Testify and Produce Documentary Evidence in a Federal Trade Commission Proceeding
- Oct. 7 -- Entered: Order to Show Cause by McGuire, J.
- Nov. 13 -- Filed: Memorandum of Points and Authorities by Petitioner
- Nov. 19 -- Filed: Brief of Respondents in Opposition to Petition to Enforce Subpoenas
- Nov. 19 -- Filed: Reply of Petitioner to Respondents' Brief in Opposition to Petition
- Dec. 1 -- Entered: Order to Consolidate Civil Action Nos. 2804-69 to 2807-69 for Trial, by Waddy, J.
- Dec. 1 -- Entered: Findings of Fact and Conclusions of Law, by Waddy, J..
- Dec. 1 -- Entered: Order that Respondents Appear before a designated Hearing Examiner of the Federal Trade Commission at a time and date set by the Commission, by Waddy, J.
- Dec. 31 -- Filed: Notice of Appeal by Respondents
- Dec. 31 -- Filed: Motion for Order Granting Stay Pending Appeal by Respondents

1970

- Jan. 7 -- Filed: Opposition of Petitioner to Respondents' Motion for Order Granting a Stay Pending Appeal
- Jan. 22 -- Entered: Order denying Respondents' Motion for Order Granting a Stay Pending Appeal, by Waddy, J.

* The docket entries enumerated were the same for Civil Action Nos. 2804-69 to 2807-69, with certain exceptions. The exceptions stem from the fact that in Civil Action No. 2806-69, on Oct. 28, 1969 there was a party substitution of General Portland Cement Company in place of H. J. Meredorf; there were also appropriate changes in the Petition and Order to Show Cause.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,
6th Street and Pennsylvania Avenue, N.W.,
Washington, D.C. 20580,

Petitioner,

v.

WALTER E. CROWTHER, Vice President and
Secretary,
LOUISVILLE CEMENT COMPANY,
501 South Second Street,
Louisville, Kentucky,

Respondent.

Civil Action

No. 2804-69

PETITION FOR AN ORDER REQUIRING RESPONDENT TO
TESTIFY AND PRODUCE DOCUMENTARY EVIDENCE
IN A FEDERAL TRADE COMMISSION PROCEEDING

The Federal Trade Commission, petitioner herein, with the consent of the Attorney General of the United States, and acting pursuant to Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, respectfully moves this Court for an order requiring the respondent to appear before a hearing examiner of the Federal Trade Commission and there to testify and produce records and documents in accordance with a subpoena duces tecum issued by petitioner during the course of an adjudicative proceeding before the Commission styled, In the Matter of Lehigh Portland Cement Company, Docket 8680. The subpoena was issued at the request of Lehigh Portland Cement Company, which is a respondent in the administrative proceeding before the Commission.

1. Petitioner is an administrative agency of the United States and is authorized and directed by Section 11 of the Clayton Act, 15 U.S.C. § 21, to enforce compliance with Section 7 of that Act, as amended, 15 U.S.C. § 18, and is authorized and directed by Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, to prohibit unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. It is empowered by Section 3 of the Federal Trade Commission Act, 15 U.S.C. § 43, to prosecute any inquiry necessary to its duties in any part of the United States, and by Section 9 of said Act, 15 U.S.C. § 49, to require by subpoena the attendance and testimony of witnesses and the production of documentary evidence. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States at any designated place of hearing.

2. Respondent, Walter E. Crowther, is vice president and secretary of the Louisville Cement Company. The office and principal place of business of respondent and the corporation are located at 501 South Second Street, Louisville, Kentucky.

3. Jurisdiction of this cause, and the power to issue the order prayed for herein are conferred upon this Court by Section 9 of the Federal Trade Commission Act, which provides that "Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring

such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question"

The proceeding, in the course of which petitioner's subpoena was issued and served, is being conducted by petitioner within the jurisdiction of this Court.

4. Acting pursuant to its authority under Section 11 of the Clayton Act, 15 U.S.C. § 21, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, the Commission has commenced an adjudicative proceeding styled In the Matter of Lehigh Portland Cement Company, Docket 8680, by the formal issuance of a complaint charging Lehigh Portland Cement Company ("Lehigh") with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and said Section 5 of the Federal Trade Commission Act. A copy of the amended complaint issued on April 24, 1967, is attached hereto as Exhibit 1. Lehigh filed an answer to the Commission's amended complaint on June 29, 1967. As the answer contained both admissions and denials of the allegations of the Commission's complaint, an evidentiary hearing is required in the aforesaid adjudicative proceeding to resolve the factual issues thus presented in the administrative pleadings.

5. Following the issuance of the Commission's complaint in Docket 8680, a duly appointed and qualified hearing examiner was designated to take testimony and receive evidence in that proceeding and to perform all other duties authorized by law.

6. In connection with said proceeding and at the request of counsel for Lehigh, the hearing examiner on January 25, 1968, exercising the powers vested in him by statute and the Commission's published rules, issued a subpoena duces tecum requiring respondent at the instance of Lehigh to appear, testify and produce specified records before the hearing examiner at a prehearing conference at the offices of the Federal Trade Commission, 414-11th Street, N.W., Washington, D.C. on February 20, 1968. The subpoena was one of several subpoenas issued at the request of Lehigh to officials of various cement companies in connection with Lehigh's prehearing preparation of its defense to the contested charges of the complaint.

A copy of the subpoena served upon respondent and a copy of the five specifications attached to it (as filed with the examiner by order dated May 31, 1968) are attached hereto as Exhibits 2 and 3 respectively.

7. Respondent and the officials of several other cement companies who had been served with similar subpoenas, appeared and moved through the same counsel to quash the subpoenas. They then entered into a stipulation with Lehigh's counsel limiting the issues to be decided on their motion to quash. A copy of this stipulation is attached hereto as Exhibit 4. On June 14, 1968, the examiner issued an order ruling on the motion to quash in light of the stipulation. The examiner modified specifications 1a, 1b(1)-(4), 2a-k, 3 and 5a-b of the subpoenas; and further directed that all material be submitted in confidence. In

addition to other protective measures, the examiner ordered that data responsive to Specifications 1b(3) and 2a-k be turned over to an impartial firm of accountants for compilation in such a way that the identity of the reporting company will not be disclosed to Lehigh or its counsel. In all other respects, the motion to quash was denied. A copy of the examiner's order is attached hereto as Exhibit 5. (Respondent is referred to in the order generally as one of the companies in the "Howrey group," from the name of counsel who represented these companies in common.)

8. Lehigh appealed from the order of the examiner to the Commission, objecting primarily to the confidential provision that the identity of the reporting company should not be divulged in responses to Specifications 1b(3) and 2a-k. On August 2, 1968, the Commission issued an order remanding the matter to the examiner for further consideration. In an accompanying opinion, the Commission explained that the examiner had resolved the question about concealing the identity of the reporting company by misinterpreting a prior Commission decision and the Commission desired to have the examiner's determination made without this error and in accordance with views set forth by the Commission in its accompanying opinion. A copy of the order and opinion of the Commission are attached hereto as Exhibit 6.

9. On remand, the examiner in an order issued on September 24, 1968, ruled this time that the information called for by the subpoenas as modified by the examiner's order of June 14, 1968, must be submitted with the identity

of the reporting company revealed to Lehigh's counsel. The examiner, however, did include in his order protective measures to guard against unnecessary disclosure of the information to Lehigh personnel and to the public generally. A copy of the examiner's order of September 24, 1968, is attached hereto as Exhibit 7. Respondent appealed to the Commission from this order (with other cement company officials represented by the same counsel), and the appeal was denied by the Commission in an order issued on November 22, 1968. A copy of the order and accompanying opinion are attached hereto as Exhibit 8.

10. Following the denial of respondent's appeal, the examiner set January 8, 1969, as the new return date of the subpoenas. A copy of the examiner's order is attached hereto as Exhibit 9. On January 28, 1969, Lehigh filed a motion with the examiner stating that certain cement companies, including respondent, had not complied with Specification 2a-k of the subpoenas. Lehigh requested that respondent's non-compliance with the subpoena (along with the non-compliance of the other persons) be certified to the Commission for enforcement proceedings pursuant to Section 9 of the Federal Trade Commission Act. A copy of said motion and of a letter attached to it from respondent's counsel stating that respondent will not comply with Specification 2a-k, are attached hereto as Exhibit 10. A copy of the examiner's certification of the motion to the Commission is attached as Exhibit 11.

11. No previous application has been made to this Court or any other court for the relief prayed.

WHEREFORE, petitioner respectfully invokes the aid of this Court and prays:

1. That the Court issue an order directing respondent, Walter E. Crowther, to appear before such duly appointed hearing examiner of petitioner as may be designated by petitioner to preside at the adjudicative proceeding styled, In the Matter of Lehigh Portland Cement Company, Docket 8680, and to testify and produce books, records, and documents called for by Specification 2a-k inclusive of the subpoena duces tecum issued by petitioner on January 25, 1968, as modified by the hearing examiner's order issued on June 14, 1968.

2. That petitioner be awarded the costs of this action; and

3. That petitioner be given such other and further relief as this Court may determine as just and appropriate.

Respectfully submitted.

Of Counsel:

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General Counsel

J. B. TRULY
General Counsel

/s/ Gerald Harwood
GERALD HARWOOD
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/s/ Karl H. Buschmann
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VERIFICATION

. GERALD HARWOOD, being duly sworn, deposes and says that he is an attorney of the Federal Trade Commission; that he has read the contents of the foregoing petition and the exhibits thereto; that the facts stated in said petition are true and the exhibits are copies of papers contained in the official files of the Federal Trade Commission; and that he has been authorized by the Federal Trade Commission to execute this verification.

/s/ Gerald Harwood
GERALD HARWOOD
Attorney

Subscribed and sworn to before me, a notary public in and for the District of Columbia, on this 15th day of July 1969.

/s/ Juanita A. Wells
Notary Public

My commission expires on March 14, 1972.

[EXHIBIT 1]

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
LEHIGH PORTLAND CEMENT COMPANY,
a corporation.

DOCKET NO. 8680.

AMENDED COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated the provisions of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18, 45, and that a proceeding in respect thereof would be in the public interest, issues this amended complaint, stating its charges as follows:

I. DEFINITIONS

1. For the purpose of this complaint the following definitions shall apply:

a. "Portland cement" includes Types I through V of portland cement as specified by the American Society for Testing Materials. Neither masonry nor white cement is included.

b. "Ready-mixed concrete" includes all portland cement concrete which is manufactured and delivered to a purchaser in a plastic and unhardened state. Ready-mixed concrete includes central-mixed concrete, shrink-mixed concrete and transit-mixed concrete.

c. "The Miami Area" consists of Dade County, Broward County and Palm Beach County, Florida.

d. "The Orlando Area" consists of Orange, Brevard and Seminole Counties, Florida.

e. "The Jacksonville Area" consists of Duval County, Florida.

f. "The Louisville Area" consists of Jefferson County, Kentucky, and Clark and Floyd Counties, Indiana.

g. "The Lexington Area" consists of Fayette County, Kentucky.

h. "The Washington Area" consists of District of Columbia, Arlington and Fairfax Counties, Virginia and City of Alexandria, Virginia and Montgomery and Prince Georges Counties, Maryland.

II. LEHIGH PORTLAND CEMENT COMPANY

2. Lehigh Portland Cement Company, hereinafter referred to as "Lehigh", is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal offices located at Allentown, Pennsylvania.

3. Lehigh, the third largest portland cement manufacturing company in the United States, operates thirteen portland cement manufacturing plants and sixteen distribution terminals located in seventeen different states. In 1964, Lehigh had sales of approximately \$83 million, assets of about \$161 million, and net income of about \$6 million.

4. In the State of Florida, Lehigh operates portland cement manufacturing plants at Bunnell (near Jacksonville), and Miami. The total shipments of portland cement from these two plants, in 1964, amounted to approximately 1,402,564 barrels, and 1,647,202 respectively. The Jacksonville Area and the Orlando Area are important metropolitan markets, accounting for 22% and 15% respectively of the total shipments from the Bunnell plant. Approximately 48% of the total shipments of the Miami plant were shipped to customers located in the Miami Area.

5. In the State of Indiana, Lehigh operates one portland cement manufacturing plant at Mitchell. The total annual capacity of this plant is approximately 2.7 million barrels. The Louisville and Lexington, Kentucky Areas are important metropolitan markets for Lehigh's Mitchell plant.

6. In the State of Virginia, Lehigh operates a portland cement plant at Fordwick and in the State of Maryland, Lehigh operates a portland cement plant at Union Bridge. The total annual capacity of these two plants is approximately 5.14 million barrels. The Washington Area is an important metropolitan market for Lehigh.

7. Lehigh is and for many years has been engaged in the shipment of portland cement across state lines. Lehigh is engaged in commerce, as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

III. MATERIALS SERVICE CORP. AND ABC CONCRETE CO.

8. Materials Service Corp., hereinafter referred to as "Materials Service", was a corporation organized and existing under the laws of the State of Florida, with its

principal office and place of business located at 1707 N. Orange Blossom Trl., Orlando, Florida. ABC Concrete Co., hereinafter referred to as "ABC", was a division of Materials Service with its principal office and place of business located at 57 S. Edgewood Ave., Jacksonville, Florida.

9. At the time of its acquisition by Lehigh, Materials Service (and its ABC Division) were engaged in the production and sale of ready-mixed concrete in the Orlando and Jacksonville areas, respectively, operating from five to seven ready-mixed concrete plants. Materials Service and ABC were substantial consumers of portland cement.

10. Materials Service was, at the time of the acquisition, engaged in commerce, as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

IV. THE ACQUISITION OF MATERIALS SERVICE CORP.

11. During the month of July 1965, Lehigh acquired the stock or assets of Materials Service. The acquisition of Materials Service by Lehigh was an act or practice in commerce within the meaning of the Federal Trade Commission Act.

V. ACME CONCRETE CO.

12. Acme Concrete Co., hereinafter referred to as "Acme", was a corporation organized and existing under the laws of the State of Florida, with its principal office and place of business located at 5700 N.W. 37 Avenue, Miami, Florida.

13. At the time of the acquisition by Lehigh, Acme was engaged in the production and sale of ready-mixed concrete in the Miami Area, operating about seven ready-mixed concrete plants. Acme was a substantial consumer of portland cement.

14. Acme was, at the time of the acquisition, engaged in commerce, as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

VI. THE ACQUISITION OF ACME CONCRETE CO.

15. During the month of July, 1965, Lehigh acquired the stock or assets of Acme. The acquisition of Acme by Lehigh was an act or practice in commerce within the meaning of the Federal Trade Commission Act.

VII. FALLS CITY CONCRETE & STONE COMPANY, INC.

16. Falls City Concrete & Stone Company, Inc., hereinafter referred to as "Falls City", was a corporation organized and existing under the laws of the State of Kentucky, with its principal office and place of business located at Fern Creek, Kentucky.

17. At the time of its acquisition by Lehigh, Falls City was engaged in the production and sale of ready-mixed concrete in the cities of Louisville, Lexington and Frankfort, Kentucky and surrounding towns. Falls City was a substantial consumer of portland cement.

18. Falls City was, at the time of its acquisition, engaged in commerce, as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

VIII. THE ACQUISITION OF FALLS CITY CONCRETE & STONE COMPANY, INC.

19. On January 7, 1966, Lehigh acquired one hundred per cent of the outstanding common stock of Falls City. The acquisition of Falls City by Lehigh was an act or practice in commerce within the meaning of the Federal Trade Commission Act.

IX. VIRGINIA CONCRETE CO., INC.

20. Virginia Concrete Co., Inc., hereinafter referred to as "Virginia Concrete", was a corporation organized and existing under the laws of the State of Virginia, with its principal office and place of business located at Shirley Highway & Edsall Road, Springfield, Virginia.

21. At the time of its acquisition by Lehigh, Virginia Concrete was engaged in the production and sale of ready-mixed concrete in the Washington Area, operating nine ready-mixed concrete plants. Virginia Concrete is one of the four largest producers of ready-mixed concrete and one of the four largest consumers of portland cement in the Washington Area.

22. Virginia Concrete was, at the time of the acquisition, engaged in commerce, as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

X. THE ACQUISITION OF VIRGINIA CONCRETE CO., INC.

23. On or about July 23, 1965, Lehigh acquired the stock or assets of Virginia Concrete. The acquisition of Virginia Concrete by Lehigh was an act or practice in commerce within the meaning of the Federal Trade Commission Act.

X-A. THE ACQUISITION OF CEMENT BLOCK INDUSTRIES
OF MIAMI, INC.

Sometime after July in 1965, Lehigh acquired the stock or assets, or both the stock and assets of Cement Block Industries of Miami, Inc., hereinafter referred to as "CBI". The acquisition of CBI by Lehigh was an act or practice in commerce within the meaning of the Federal Trade Commission Act.

CBI was a corporation organized and existing under the laws of the State of Florida, with its principal office and place of business located at 4490 S.W. 74th Avenue, Miami, Florida.

At the time of its acquisition by Lehigh, CBI and its affiliates were engaged in the production and sale of ready-mixed concrete, cement blocks, and masonry materials in the greater Miami area, operating a ready-mixed concrete plant there. CBI was a substantial consumer of portland cement.

CBI, at the time of the acquisition, was engaged in commerce, as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

XI. NATURE OF TRADE AND COMMERCE

24. Portland cement is a material which in the presence of water, binds aggregates, such as sand and gravel, into concrete. Portland cement is an essential ingredient in the production of ready-mixed concrete. There is no practical substitute for portland cement in the production of concrete.

25. The portland cement industry in the United States is substantial. In 1964, there were about 52 cement companies in the United States operating approximately 181 plants. Total shipments of portland cement in that year amounted to approximately 365 million barrels, valued at about \$1.1 billion.

26. Cement manufacturers sell their portland cement to consumers such as ready-mixed concrete companies, concrete products companies, and to contractors and building materials dealers. However, on a national basis, approximately 57% of all portland cement is shipped to firms engaged in the production and sale of ready-mixed concrete.

27. In recent years, there has been a significant trend of mergers and acquisitions by which ready-mixed concrete companies in major metropolitan markets in various portions of the United States have become integrated with portland cement companies. Since 1959, there have been at least 35 such acquisitions.

28. The acquisition of ABC is the second acquisition of a substantial portland cement consumer by a portland cement manufacturer in the Jacksonville Area since 1962.

29. Each vertical merger or acquisition which occurs in the portland cement industry potentially forecloses competing cement manufacturers from a segment of the market otherwise open to them and places great pressure on competing manufacturers likewise to acquire portland cement consumers in order to protect their markets. Thus, each such vertical acquisition may form an integral part of a chain reaction of such acquisitions -- contributing both to the share of the market already foreclosed, and to the impetus for further such acquisitions.

XII. VIOLATIONS CHARGED

30. The effect of the acquisition of Materials Service (and its ABC Division) by Lehigh, both in itself and by aggravating the trend of vertical mergers and acquisitions, may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of portland cement and ready-mixed concrete in the United States as a whole and various parts thereof, including the State of Florida, the Orlando Area, and the Jacksonville Area, in the following ways, among others:

a. Lehigh's competitors may have been and/or may be foreclosed from a substantial segment of the market for portland cement.

b. The ability of Lehigh's non-integrated competitors effectively to compete in the sale of portland cement and ready-mixed concrete has been and/or may be substantially impaired.

c. The entry of new portland cement and ready-mixed concrete competitors may have been and/or may be inhibited or prevented.

d. The production and sale of ready-mixed concrete, now a decentralized, locally-controlled, small business industry, may become concentrated in the hands of a relatively few manufacturers of portland cement.

31. The effect of the acquisition of Acme by Lehigh, both in itself and by aggravating the trend of vertical mergers and acquisitions, may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of portland cement and ready-mixed concrete in the United States as a whole and various parts thereof, including the State of Florida and the Miami Area, in the following ways, among others:

a. Lehigh's competitors may have been and/or may be foreclosed from a substantial segment of the market for portland cement.

b. The ability of Lehigh's non-integrated competitors effectively to compete in the sale of portland cement and ready-mixed concrete has been and/or may be substantially impaired.

c. The entry of new portland cement and ready-mixed concrete competitors may have been and/or may be inhibited or prevented.

d. The production and sale of ready-mixed concrete, now a decentralized, locally-controlled, small business industry, may become concentrated in the hands of a relatively few manufacturers of portland cement.

32. The effect of the acquisition of Falls City by Lehigh, both in itself and by aggravating the trend of vertical mergers and acquisitions, may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of portland cement and ready-mixed concrete in the United States as a whole and various parts thereof, including the State of Kentucky and the Louisville and Lexington Areas, in the following ways, among others:

a. Lehigh's competitors may have been and/or may be foreclosed from a substantial segment of the market for portland cement.

b. The ability of Lehigh's non-integrated competitors effectively to compete in the sale of portland cement and ready-mixed concrete has been and/or may be substantially impaired.

c. The entry of new portland cement and ready-mixed concrete competitors may have been and/or may be inhibited or prevented.

d. The production and sale of ready-mixed concrete, now a decentralized, locally-controlled, small business industry, may become concentrated in the hands of a relatively few manufacturers of portland cement.

33. The effect of the acquisition of Virginia Concrete by Lehigh, both in itself and by aggravating the trend of vertical mergers and acquisitions, may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of portland cement and ready-mixed concrete in the United States as a whole and various parts

thereof, including the States of Maryland and Virginia, the District of Columbia and the Washington Area, in the following ways, among others:

a. Lehigh's competitors may have been and/or may be foreclosed from a substantial segment of the market for portland cement.

b. The ability of Lehigh's non-integrated competitors effectively to compete in the sale of portland cement and ready-mixed concrete has been and/or may be substantially impaired.

c. The entry of new portland cement and ready-mixed concrete competitors may have been and/or may be inhibited or prevented.

d. The production and sale of ready-mixed concrete, now a decentralized, locally-controlled, small business industry, may become concentrated in the hands of a relatively few manufacturers of portland cement.

34. The effect of the acquisition of CBI by Lehigh, both in itself and by aggravating the trend of vertical mergers and acquisitions, may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of portland cement and ready-mixed concrete in the United States as a whole and various parts thereof, including the State of Florida and the Miami Area, in the following ways, among others:

a. Lehigh's competitors may have been and/or may be foreclosed from a substantial segment of the market for portland cement.

b. The ability of Lehigh's non-integrated competitors effectively to compete in the sale of portland cement and ready-mixed concrete has been and/or may be substantially impaired.

c. The entry of new portland cement and ready-mixed concrete competitors may have been and/or may be inhibited or prevented.

d. The production and sale of ready-mixed concrete, now a decentralized, locally-controlled, small business industry, may become concentrated in the hands of a relatively few manufacturers of portland cement.

NOW THEREFORE, the acquisitions of Materials Service, Acme, Falls City, Cement Block Industries, and Virginia Concrete are in violation of Section 7 of the Clayton Act,

as amended, and constitute unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 24th day of April A.D.. 19 67, issues its amended complaint against said respondent.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 12th day of June A.D. 1967, at 10 o'clock is hereby fixed as the time and Federal Trade Commission offices, 1101 Building 11th & Pennsylvania Avenue, N. W., Washington, D. C. as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the hearing examiner shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the hearing examiner, without further

notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint:

I

IT IS ORDERED that respondent Lehigh Portland Cement Company, hereinafter referred to as "Lehigh", divest, to a purchaser or purchasers approved by the Federal Trade Commission, all stock and/or assets acquired by Lehigh as the result of its acquisition of Materials Service Corp., Acme Concrete Co., Falls City Concrete & Stone Company, Inc., Cement Block Industries of Miami, Inc., and Virginia Concrete Co., Inc., together with all additions thereto and replacements thereof. It is further ordered that Lehigh begin to make good faith efforts to divest said stock and/or assets promptly after the effective date of this Order, and that it continue such efforts to the end that the divestiture thereof be accomplished within one (1) year.

II

IT IS FURTHER ORDERED that, pending divestiture, Lehigh not make any changes in any of the aforesaid stock and/or assets which would impair their present capacity for the production and sale of ready-mixed concrete, or other products produced, or their market value.

III

IT IS FURTHER ORDERED that, in the aforesaid divestiture, none of the stock and/or assets be sold or transferred, directly or indirectly, to any person who is at the time of divestiture an officer, director, employee, or agent of, or under the control or direction of, Lehigh or any of its subsidiaries or affiliates, or to any person who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Lehigh or any of its subsidiaries or affiliates.

IV

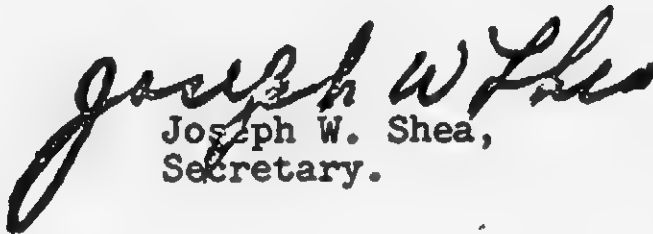
IT IS FURTHER ORDERED that Lehigh cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, any part of the stock or assets of any firm engaged in the production and/or sale of ready-mixed concrete in the United States without the prior approval of the Federal Trade Commission.

V

IT IS FURTHER ORDERED that Lehigh, within sixty (60) days from the effective date of this Order, and every sixty (60) days thereafter until it has fully complied with the provisions of Paragraphs I through III of this Order, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it intends to comply, is complying, and/or has complied with this Order. All compliance reports shall include, among other things that will be from time to time required, a summary of all contacts and negotiations with potential purchasers of the stock and/or assets to be divested under this Order, the identity of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its amended complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 24th day of April, 1967.

By the Commission.


Joseph W. Shea,
Secretary.

F. T. C. 70

[EXHIBIT 2]

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

To Mr. Walter E. Crowther, Vice President and Secretary
Louisville Cement Company
501 South Second Street
Louisville, Kentucky 40202

You are hereby required to appear before _____

 Joseph W. Kaufman

a Hearing Examiner of the Federal Trade Commission, at _____

 414 - 11th Street, N.W., 7th Floor, offices of the Federal Trade

 Commission, room 7312, at a pre-hearing conference.

in the City of _____ Washington, D. C.

on the 20th *day of* February, 1968, *at* 2:00 *o'clock*

p. m. of that day, to testify at the instance of the Lehigh Portland
Cement Company, respondent in Docket 8680

and you are hereby required to bring with you and produce at said time and
place the following books, papers, and documents:

those documents specified on the Attachment hereto.

Fail not at your peril.

In testimony whereof, the undersigned, a Hear-
ing Examiner of the Federal Trade Commission, has
hereunto set his hand and the said Federal Trade
Commission has caused its seal to be affixed at
Washington, D. C., this 25th *day of* January,
1968

 Hearing Examiner.

16-76474-1

NOTICE TO WITNESS.—If claim is made for witness fee or mileage, this subpoena should accompany voucher.

RETURN OF SERVICE

*I hereby certify that a duplicate original
of the within subpoena was*

in person.
☒ *by registered mail.*
*by leaving copy at principal
office or place of business, to
wit:*

duly served
 (Indicate by
check (✓) method
used.)

on the person named herein on _____

January 1968

 (Month, day, and year)

David J. [Signature]

 (Name of person making service)

Attorney General

 (Official title)

*I certify that the person named herein
was in attendance as a witness at* _____

on _____
 (Month, day or days, and year)

 (Name of person certifying)

 (Official title)

U. S. GOVERNMENT PRINTING OFFICE 16-60113-1

[EXHIBIT 3]

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

[Caption Omitted in Printing]

Order Directing Filing of
ANNEXED "CEMENT" SPECIFICATIONS
of Subpoenas Duces Tecum
Issued in Respondent's Behalf
(Re Motions to Quash)

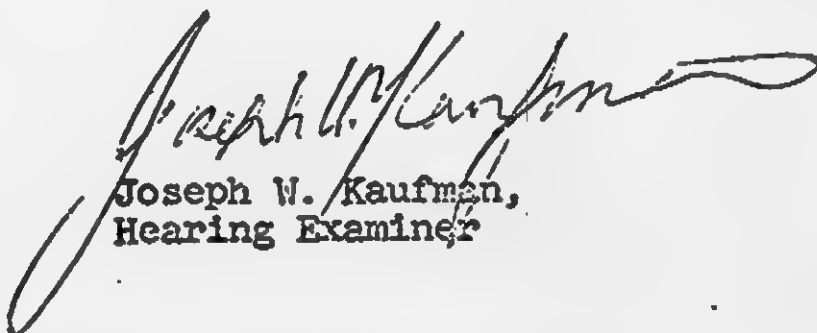
Annexed is a copy of the Specifications of subpoenas
duces tecum issued in respondent's behalf and directed
against third party cement companies.



The said Specifications are the main subject matter of motions to quash by said third parties represented by counsel from the firm of Howrey, Simon, Baker & Murchison or one of a number of other law firms.

Said copy of the Specifications is hereby approved for filing. No copies of this order or of the Specifications need be served.

SO ORDERED.


Joseph W. Kaufman,
Hearing Examiner

May 31, 1968

SPECIFICATIONS OF SUBPOENAS DUCES TECUM TO
PORTLAND CEMENT MANUFACTURING FIRMS

DEFINITIONS

"This company" means the company or firm to which the attached subpoena duces tecum is addressed and any subsidiary, affiliate or parent corporation thereof.

"Portland cement" includes Types I-V of portland cement as specified by the American Society of Testing Materials. Neither masonry nor white cement is included.

"Purchaser" means any individual, corporation, partnership or association (but not including divisions, subsidiaries or distribution terminals of this company) which buys portland cement from this company.

"Transferee" means any division, subsidiary or distribution terminal of this company which receives or buys portland cement manufactured by this company.

"Shipment" means net delivery of portland cement by this company to purchasers and transferees, but not including deliveries to manufacturing plants and distribution terminals which are operated by other portland cement manufacturing companies and which are located in the states and locations listed in Specification 1a below.

SPECIFICATIONS

1. Originals or true copies of such books, records and other documents, or a verified summary in lieu thereof, which will disclose for this company:
 - a. The name and location of each portland cement manufacturing plant and of each portland cement distribution terminal of this company which shipped portland cement in or into any of the following states or locations at any time during the calendar years 1957-1966: Florida, Georgia, Alabama, District of Columbia, Maryland, Virginia, West Virginia, Kentucky, Tennessee, Indiana, Illinois and Ohio. (If Specification 1a is not applicable to this company, the remaining specifications need not be answered).
 - b. Separately for each portland cement manufacturing plant, and separately for each portland cement distribution terminal identified in response to Specification 1a above:
 - (1) Its annual productive capacity (in the case of a manufacturing plant), or its storage capacity (in the case of a distribution terminal), in barrels of cement on December 31, 1966.

(2) For each calendar year 1963-1966, the total shipments of portland cement, in barrels, and also for each calendar year 1963-1966, a breakdown of the total shipments according to the county into which the shipments were made. (If records of this company are not kept on a basis readily permitting a county-by-county breakdown of cement shipments, verified estimates and an explanation of the method used for making such estimates should be submitted).

(3) For each calendar year 1963-1966, a breakdown of the total shipments reported in response to Specification 1b(2) above according to type of purchaser or type of transferee. (Responsive materials should show or enable a breakdown to be made of the total amount of shipments, in barrels for each year, so as to show the total shipments to each company operated distribution terminal and to each of the following categories: (1) other divisions or subsidiaries of this company, (2) ready-mixed concrete producers, (3) concrete products producers, (4) contractors, (5) building supply dealers, (6) governmental units (includes federal, state, county, and local governments, and agencies thereof), and (7) other purchasers).

(4) The name of each county into which shipments of portland cement were made during the calendar year 1957.

2. Originals or true copies of such books, records and other documents, or a verified summary in lieu thereof, which will disclose the existence,

at any time from January 1, 1963 to date, of any of the following relationships between this company and any cement purchaser located in the states or locations listed in Specification 1a above, and the details of each such relationship:

- a. Any secured or unsecured debt (other than any debt incurred in the purchase of cement and paid within ninety (90) days of the shipment of the cement with respect to which said debt was incurred), whether or not due, outstanding to this company by a cement purchaser.
- b. Any debt of a cement purchaser guaranteed in whole or in part by this company.
- c. Any lease, whether oral or in writing, between this company and a cement purchaser regarding any assets used by such cement purchaser in the production or distribution of ready-mixed concrete or concrete products, or used by this company.
- d. Any lease-purchase agreement, real estate transaction, and any other arrangement between this company and a cement purchaser regarding any assets used by such cement purchaser in the production or distribution of ready-mixed concrete or concrete products, or used by this company.
- e. Any right or option, conditional or unconditional, of this company to acquire at any time, directly or indirectly, any part of the stock of assets owned or used by a cement purchaser.

- f. Any sale or sales of equipment or other property (other than portland cement) by this company to a cement purchaser, or the guarantee by this company of credit for any purchase or purchases of equipment or property by a cement purchaser.
 - g. Any purchase or purchases by this company of equipment or property from a cement purchaser, or the guarantee by a cement purchaser of credit for any purchase or purchases of equipment or property by this company.
 - h. The furnishing by this company, by construction or otherwise, of equipment or other property, directly or indirectly, for or on behalf of a cement purchaser without charge or for a consideration less than the fair value of the equipment or property furnished.
 - i. Any contribution to capital by or on behalf of this company to or on behalf of a cement purchaser.
 - j. The placing or retaining on the payrolls of this company of any officers or employees of a cement purchaser; and
 - k. The presence of one or more of the members of the Board of Directors or employees of this company on the Board of Directors or members of management of a cement purchaser.
3. Originals or true copies of such books, records and other documents, or a verified summary in lieu thereof, which will disclose the names and locations of all corporations, partnerships, associations or individual businesses, which purchase portland cement (whether or not manufactured by this company), and which were and/or are owned in

whole or in part (more than 10% of stock or assets) by this company at any time from January 1, 1963 to date.

4. For the period January 1, 1965 to date, originals or true copies of all written communications, and of all memoranda relating to any telephone or oral conversations, between this company (including any officer, director or employee thereof) and any representative of the Federal Trade Commission, concerning the acquisitions by Lehigh Portland Cement Company of any of the following companies: Materials Service Corporation, Acme Concrete Corp., Falls City Concrete & Stone Co., Inc., Virginia Concrete Company, Incorporated, and Cement Block Industries of Miami, Inc. (excepting responses by this company to the subpoena duces tecum issued by the Federal Trade Commission, dated March 23, 1967, re In the Matter of Lehigh Portland Cement Company, Docket 8680, and excepting any written correspondence between this company and the Federal Trade Commission relating to such subpoena).
5. For each calendar year 1963-1966, originals or true copies of such books, records and other documents, or a verified summary in lieu thereof, which will disclose for this company the following information:
 - a. The name of each construction product (including but not limited to structural clay products, plate and other flat glass, prefabricated gypsum products, fabricated structural iron and steel products and miscellaneous metal building products), which this

company shipped in or into any of the states or locations listed in Specification 1a above.

- b. For each such construction product, the value of such products shipped by this company.

[EXHIBIT 4]

[Caption Omitted in Printing]

STIPULATION

Having met with the Hearing Examiner and he having indicated his tentative opinion as to the relevancy and materiality of each of the specifications of the subpoenas duces tecum issued by him on January 25, 1968, to deponents;^{1/} and without deponents waiving any of the arguments with respect to the lack of relevancy or materiality of the information called for by the subpoena, as set forth in their Motions to Quash, filed February 8, 1968, and their Memoranda in Support, filed February 21, 1968, either for the purpose of decision by the Hearing Examiner or for the purpose of appeal to the Commission or review in the Courts, and solely for the purpose of setting forth the positions of the deponents and respondent, Lehigh Portland Cement Company, with respect to the confidentiality of the information called for by the subject subpoenas duces tecum issued by the Hearing Examiner

1. Deponents are: Walter E. Crowther, Vice President and Secretary, Louisville Cement Company; Worth Loomis, Vice President - Administration and Secretary, Medusa Portland Cement Company; William L. Lucas, Secretary and Treasurer, Martin Marietta Corporation; Frank L. Holleman, Secretary and Treasurer, Arkansas Louisiana Gas Company; L. T. Welshans, President, Bessemer Cement Company; H. J. Meredorf, Secretary and Treasurer, General Portland Cement Company; William J. Bramman, Jr., Vice President and Secretary, Missouri Portland Cement Company.

on January 25, 1968 to deponents, and without respondent, waiving any legal arguments thereto, it is hereby stipulated as follows by counsel for respondent, Lehigh Portland Cement Company, and counsel for deponents, for purposes of this proceeding only, and subject to approval by the Hearing Examiner:

1. (a) As to Specification 1(a), respondent agrees that Specification 1(a) may be limited to the calendar years 1961-1966, rather than the calendar years 1957-1966.

Deponents agree to produce documents responsive to Specification 1(a) as modified, provided the subpoenas are limited to the six geographic areas set forth in Paragraph 6 below.

(b) As to Specification:

1(b)(1) Deponents agree to produce responsive documents provided the subpoenas are limited to the six geographic areas set forth in Paragraph 6 below.

1(b)(2) Deponents agree to produce responsive documents provided the subpoenas are limited to the six geographic areas set forth in Paragraph 6 below, and the manner of production is subject to Paragraph 7 below.

1(b)(3) Respondent agrees to accept a verified summary breaking down total shipments reported in response to Specification 1(b) (2) according to the following categories: (1) shipments to each company-operated distribution terminal (2) to other divisions or subsidiaries of the company; (3) to ready-mix concrete producers; and (4) to all other purchasers.

Deponents agree to produce documents responsive to Specification 1(b)(3) as modified, provided the subpoenas are limited to the six geographic areas set forth in Paragraph 6 below, and the manner of production is subject to Paragraph 7 below.

1(b)(4) Respondent agrees that "1957" may be deleted and "1961" substituted therefor.

Deponents agree to produce documents responsive to Specification 1(b)(4) as modified, provided the subpoenas are limited to the six geographic areas set forth in Paragraph 6 below.

2. As to Specification 2(a) - (k), respondent agrees that Specification 2(a) shall be modified to read as follows:

"a. Any secured or unsecured debt in excess of \$10,000 (other than any debt incurred in the purchase of cement and paid within ninety (90) days² of the shipment of the cement with respect to which said debt was incurred), whether or not due, outstanding to this company by a cement purchaser."

Respondent further agrees that the phrase "or concrete products" may be deleted from Specifications 2(c) and 2(d).

Deponents agree to produce documents responsive to Specification 2(a) - (k) as modified, provided the subpoenas are limited to the six geographic areas set forth in Paragraph 6 below, the manner of production is subject to Paragraph 7 below, and that wherever the phrase "cement purchaser" is used in

² Respondent will accept, without modifying the Specification, only those debts not paid within one hundred and twenty (120) days from any deponent who will also furnish a notarized statement that it has no available list of debts on a ninety (90) day basis.

Specification 2, such phrase be deleted and the phrase "ready mix company" be substituted in lieu thereof. Respondent does not agree to the modification of Specification 2 deleting the phrase "cement purchaser" and substituting the phrase "ready mix company" in lieu thereof.

3. As to Specification 3, deponents agree to produce responsive documents, provided the subpoenas are limited to the six geographic areas set forth in Paragraph 6 below, the manner of production is subject to Paragraph 7 below, and that the words "for the production of ready-mix concrete" be inserted after the words "which purchase portland cement". Respondent does not agree to the modification of Specification 3 inserting the words "for the production of ready-mix concrete".

4. As to Specification 4, deponents adhere to their legal objections set forth in their Motions to Quash, filed February 8, 1968, and Memoranda in Support, filed February 21, 1968. Respondent also adheres to its legal position set forth in Answer By Respondent To Memoranda In Support Of Motions To Quash Subpoenas Duces Tecum On Behalf Of Seven Cement Manufacturers, pages 13-15, filed February 29, 1968. However, for the purpose of expediting this matter, deponents hereby state that none of them has any documents responsive to Specification 4.

5. As to Specification 5(a) - (b), respondent agrees that the Specification may be limited to the year 1966 only, rather than to the years 1963-1966. Respondent further agrees that if the value of construction products listed in response to Specification 5(a) exceeds 5% of the total sales of any

deponent, such deponent^{3/} will submit for the calendar year 1966 original or true copies of such books, records or other documents, or a verified summary in lieu thereof, which will disclose for such deponent the value of such construction products shipped.

Deponents say that Specification 5 is not restrictive as to any geographic area but deponents agree to produce responsive data to Specification 5(a) and (b) as modified and limited to the six geographic areas set forth in Paragraph 6 below.

6. As to Specifications 1(a), 1(b)(1) - (4), 2(a) - (k), 3 and 5, deponents adhere to their legal position set forth in their Motion to Quash, filed February 8, 1968, and Memoranda in Support, filed February 21, 1968, that the "subpoena is unduly broad as to geographic scope" and that the information requested by each such specification should be limited to six local areas set forth in the Amended Complaint.^{4/}

Respondent also adheres to its legal position set forth in Answer By Respondent To Memoranda In Support Of Motion to Quash Subpoenas Duces Tecum On Behalf Of Seven Cement Manufacturers, pages 6-9, filed February 29, 1968,

3.-Inasmuch as the Bessemer Cement Company does not exist and Diamond Alkali Company is no longer in the business of manufacturing or distributing cement through Bessemer Cement Company, which it has divested, the response of deponent Bessemer Cement Company shall be limited to the Bessemer Cement Division of Diamond Alkali Company as it existed in 1966.

4. These areas are: The Miami Area; the Orlando Area; the Jacksonville Area; the Louisville Area; the Lexington Area; and the Washington Area.

that the geographic areas pertinent to Specifications 1(a), 1(b)(1)-(4), 2(a)-(k), 3 and 5 are appropriate and proper in every instance. However, as to Specifications 1(a), 1(b)(1)-(4), 2(a)-(k), 3 and 5, if respondent is able to obtain compliance with the subpoenas duces tecum without appeals to the Commission, respondent agrees to accept at this time responsive documents limited to areas alleged as relevant geographic markets in the Amended Complaint--i.e., the States of Florida, Kentucky, Maryland and Virginia, and including the seven smaller local areas;^{5/} provided, however, that nothing contained in this paragraph shall be considered to preclude respondent from petitioning the Hearing Examiner after completion of complaint counsel's case-in-chief for any appropriate directions or process to compel the production of the information relating to the geographic areas as originally delineated in respondent's subpoena.

7. With respect to the documents produced responsive to Specifications 1(b)(2), 1(b)(3), 2(a)-(k), and 3, deponents adhere to their legal position as set forth in their Motions to Quash and Memoranda in Support, filed February 21, 1968, that the information requested is confidential, and deponents will not submit any response to the foregoing Specifications unless such responses shall be submitted to an independent accounting firm to be selected in accordance with procedures

5. In addition to the six areas specifically alleged in the Amended Complaint, complaint counsel have alleged that the Frankfort Area, defined as Franklin County, Kentucky, is a relevant geographic market.

utilized in, and that the data be treated in the same confidential manner as in Mississippi River Fuel Corp., Dkt. 8657. Counsel for respondent adheres to its legal position as set forth in Answer By Respondent To Memoranda In Support Of Motions To Quash Subpoenas Duces Tecum On Behalf Of Seven Cement Manufacturers, pages 16-17, filed February 29, 1968, that such documents and information are not entitled to the confidential treatment sought by deponents. See also Answer By Respondent To Motion To Quash Or Limit A Subpoena Duces Tecum On Behalf Of Woodward Iron Company, pp. 4-11 (February 23, 1968).

8. It is further stipulated by counsel for respondent, Lehigh Portland Cement Company, and by counsel for deponents that unless and until offered in evidence as exhibits in the above-captioned proceeding, and subject to further order by the Hearing Examiner, all documents, correspondence, data and verified summaries submitted by deponents to counsel for respondent in said proceeding in response to the subpoena duces tecum issued by the Hearing Examiner on January 25, 1968, will be kept strictly confidential, for use only by independent legal counsel for respondent, Lehigh Portland Cement Company, or by counsel's technical experts not regularly employed by respondent Lehigh, as counsel for respondent may deem necessary in connection with their preparation of this adjudicative proceeding. Provided, however, that any documents designated as trial exhibits by counsel for respondent may be disclosed to counsel for the Federal Trade Commission pursuant to pre-

trial procedures in this case. Counsel for respondent will request the Hearing Examiner to order FTC counsel also to treat such information on a confidential basis.

9. Counsel for respondent further agrees not to oppose any appropriate request or motion by deponents to the Hearing Examiner, in connection with any offer in evidence of such materials, protecting against public disclosure of any materials submitted by deponents in response to the above-referenced subpoena duces tecum.

Date:

5-17-68

Bonald W. S.
Counsel for Respondent
Lehigh Portland Cement Company

16 May 68

J. W. Waller Adair
Counsel for Deponents

[EXHIBIT 5]

[Caption Omitted in Printing]

ORDER MODIFYING SUBPOENAS DUCES
TECUM, IN RESPONDENT'S BEHALF, DIRECTED
AGAINST THIRD PARTY CEMENT COMPANIES

(June 14, 1968)

Respondent is a large cement company which has acquired by merger a number of ready-mixed concrete companies, as alleged in the amended complaint.

Subpoenas duces tecum were duly issued by the examiner herein in behalf of respondent*. They are directed to numerous third party cement companies — presumably as competitors, or potential competitors, of respondent.

* More precisely the subpoenas are, in general addressed to officers of the companies — each stating the officer's name, his office, and the company name.

Of the 36 subpoenas issued, there has been compliance, as the examiner has been informed by respondent's counsel, to the extent noted in the following tabulation:

Compliance by mail	22
No compliance (and no motions)	1
Present motions	<u>13</u>
Total	36

One of the present 13 motions, that of Lone Star Cement Corporation, is addressed to only one Specification of the subpoenas, Lone Star having apparently complied with all the others.

The subpoenas issued herein to all cement companies have identical Specifications, numbered 1 through 5, and also subnumbered. A one-page summary of the Specifications, as so numbered and subnumbered, is attached to this order.

The following is a list identifying the movants herein by the names of the respective cement companies involved. The list also contains under each company name the name of counsel who have filed appearances and the law firm of said counsel.

List of Movants* and Counsel

Arkansas Louisiana Gas Company
 Bessemer Cement Company
 General Portland Cement Company
 Louisville Cement Company
 Martin Marietta Corporation
 Medusa Portland Cement Company
 Missouri Portland Cement Company
 William Simon, J. Wallace Adair, and Gerald Kadish
 Howrey, Simon, Baker & Murchison

Dundee Cement Company
 Michael I. Miller
 Isham, Lincoln & Beale

Lone Star Cement Corporation
 Melvin C. Garbow
 Arnold & Porter

* The movant may, more precisely, be the company officer named in the subpoena.

Marquette Cement Manufacturing Company
 William P. O'Keefe, Jr.
 Norman Engelhardt Holland Billick Franke
 & Lauritzen.

National Gypsum Company
 William L. Rieth
 Phillips, Lytle, Hitchcock, Blaine & Huber

United States Steel Corporation
 The Flintkote Company
 Kevin L. Carroll
 White & Case

Respondent is represented by Frederick M. Rowe, Ronald J. Wilson, Richard C. Lowery, and A. Paul Victor, of Kirkland, Ellis, Hodson, Chaffetz & Masters.

There is a memorandum from each movant, or from each group of movants. As expressly invited by the examiner, each of the movants, or groups, has submitted a supporting affidavit -- except the "Howrey" group, and also except Lone Star Cement Company, which, as already noted, objects to only one Specification (and subsections).

The respondent in each instance has submitted an answering memorandum. In one or more instances there have been additional memoranda.

Most of the movants have requested oral argument but, in the examiner's discretion, none has been granted.

The examiner sent a written notice to counsel of each of the movants suggesting that said counsel negotiate with respondent's counsel for the purpose of agreeing on the Specifications, so far as possible. The notice suggested the desirability of conferences between said counsel, and further states that the examiner "will be available for consultation with both sides, on short notice."

In line with this notice respondent's counsel, as the examiner is advised, has had conferences with certain of said counsel, negotiations by mail and telephone with others, and unrewarding communications with others. -- It should also be noted that at the time of serving each subpoena by mail, respondent's counsel advised that it was ready to accept returns by mail, to stipulate as to justifiable matters, and to offer an agreement of confidentiality whereby the respondent itself would not have access to disclosed matters during prehearing, and respondent's counsel would not oppose further protection after prehearing.

As already noted, a large number of firms receiving subpoenas have complied (some of whom even filed motions) but there are motions from 13 firms to be considered here, although seven of these are represented by the Howrey law firm.

As it turned out, the only conference participated in by the examiner, between respondent's counsel and counsel for movants, has been with members of the Howrey law firm, who presented objections to the subpoenas vigorously. Although none of the other law firms contacted the examiner for such a joint conference, the examiner has gotten the impression that they, or most of them, have been following fairly closely the Howrey negotiations and are well advised as to the stipulation usually referred to herein as the Howrey stipulation, resulting from the aforementioned conference with the examiner, and other conferences without the examiner.

The said stipulation, dated May 16, 1968 and May 17, 1968, is signed by J. Wallace Adair, as counsel for the seven deponents, and Ronald J. Wilson, as counsel for respondent. The stipulation is being filed at or about the time of the filing of this order, as is a copy of the Specifications of the subpoenas. (The stipulation is a companion to another "Howrey" stipulation in respect to the "concrete" subpoenas, which are the subject of the examiner's prior order dated May 29, 1968).

The present stipulation, like the prior "concrete" stipulation, has prefatory and other reservations. The reservations therein are very guarded, particularly, it would seem, in behalf of the Howrey deponents. One qualifying statement therein is that the stipulation is made "solely for the purpose of setting forth the positions of the deponents and respondent *** with respect to the confidentiality of the information called for by the subject subpoenas ***." The dominant note in the stipulation is that large portions of the Specifications, even if modified as indicated therein within stated inside and outside limits, will not be furnished by the Howrey deponents unless the procedure for confidentiality set forth in the Mississippi* case is followed.

The first objection to the subpoenas accordingly is the lack of any direction for the confidentiality procedure of the Mississippi case.

The confidentiality procedure in the Mississippi case, provides that requested information in subpoenas duces tecum be submitted to an impartial firm of accountants for

* Matter of Mississippi River Fuel Corporation, D. 8657, Order of the Commission, dated June 8, 1966, pp. 4-5.

compilation in such a way that the identity of the reporting companies will not be revealed. The respondent does not get the requested information itself, directly or indirectly.

Respondent's main answer to the request for the Mississippi type of confidentiality is that respondent's counsel have agreed to receive any information by way of discovery without revealing it to respondent itself, and to reveal it to no others except independent counsel's technical experts in connection with trial preparation (and except to complaint counsel where documents are designated by respondent as trial exhibits). Respondent's counsel have also agreed not to oppose appropriate motions, by the third party deponents, for confidential treatment at the hearing itself. These two agreements by respondent's counsel as to confidentiality are contained in the last two paragraphs of the stipulation (and also of the "concrete" stipulation). They represent substantially the same confidentiality treatment offered initially by respondent to all subpoenaed deponents.

The examiner is constrained to state at once, as he has stated in his prior "concrete" order, that it is his opinion that the Mississippi method of insuring confidentiality, however commendable is any effort to insure confidentiality here within the bounds of law, does impair quite substantially the usefulness of the information to the party requesting the information. It is the examiner's further opinion that this is particularly so in respect to respondent's right to general discovery, i.e., for cross-examination and general purposes. This right was expressly accorded by the 1967 amendment to the Rules of the Commission made by Section 3.34(b)(2), first sentence, about a year after the Commission announced the confidentiality doctrine in the Mississippi case. It is to be noted in this connection that general discovery is in addition to discovery for the purpose of obtaining information actually to be used as evidence, as alone provided for in the Rules prior to the 1967 amendment.

However, in spite of the above consideration, the examiner is constrained to state further, as he has stated in his prior order, that it is his feeling that he must act in full deference to the Mississippi doctrine of protecting confidentiality and to the policy statements in that connection announced by the Commission by its order in the Mississippi case — as well as in its more emphatic order on reconsideration, dated July 15, 1966, denying respondent the right to "rummage" through papers of its competitors. The examiner must bear in mind that respondent here is asking for rather sensitive information from its own competitors, or potential competitors, who as such have been allegedly damaged by respondent's acquisitions of ready-mix concerns purchasing cement.

Accordingly, as will appear below, the present order modifies the subpoenas issued herein so as to provide for Mississippi confidentiality treatment insofar as the almost identical specifications appear in the subpoenas of both the Mississippi case and the present case. As to other specifications for which Mississippi treatment is requested by movants, the examiner in general, although not in all instances (see Specification 1 b(3)), declines to modify the subpoenas so as to provide for Mississippi treatment. The examiner regards the confidentiality stipulated by respondent's counsel as generally quite adequate.

A second objection of the movants is that supplying the requested information would cause great hardship, including undue expense. However, the modifications set forth in the stipulation in effect eliminate the hardship objection, at least so far as concerns the Howrey deponents. This conclusion is supported by the fact that the Howrey memorandum does make much of the hardship objection. The same result follows as to the other movants. To be sure they, unlike the Howrey deponents, have also submitted supporting affidavits. But the examiner refers to the affidavits and shows that the hardship objection is eliminated as to all movants by the modifications. Much of the claimed hardship is due to the request of the subpoenas for a county breakdown, but the objection based on hardship is met by reducing very substantially the 12-state area for which the subpoenas request information.

A third objection, which is pressed by the Howrey memorandum and by other memoranda, is that the requested information in general is not relevant. However, the Howrey stipulation does not press this objection, although rights thereunder are reserved. The examiner rejects this general objection in respect to relevancy made by any of the movants.

The Rules, under Section 3.34(b)(1), require only "general relevancy". Section 3.34(b)(2), first sentence, as already stated, provides that discovery need not be limited to obtaining documents to be used in evidence. Moreover, the Commission, affirming this examiner, has ruled in the present case that the second sentence is not, in general, a limitation on the scope of subpoenas duces tecum. (Commission order, March 19, 1968. See also examiner's order, March 8, 1968, on another motion herein, not appealed.)*

* Attention is also called to the very recent amendment to Section 3.34(b)(2), second sentence, clarifying the meaning.

Finally, the examiner rejects the argument that Section 9 of the Federal Trade Commission Act limits a Commission subpoena to obtaining information to be used in evidence. The word "evidence" is used there in a loose sense, consistent even with general information gathered in investigations. Section 4 of the Federal Trade Commission Act, moreover, contains a very broad definition of documentary evidence.

A fourth objection is to a request (Specification 4) for copies of statements, correspondence, and communications, between deponent and personnel of the Commission, and for memoranda of telephone or other conversations with such personnel — as to acquisitions alleged in the complaint, as amended. The Howrey stipulation states that Howrey deponents have no such papers — making the objection moot as to them. The memoranda and affidavits of the other movants make no particular point as to this type of objection. In any event, the examiner rules that the request in the subpoenas is proper, and, among other things, that the Jencks Rule is not applicable to a copy, in deponent's possession, of a Jencks statement. See St. Regis Paper Co. v. United States, 368 U.S. 208, 218 (1961), infra.

A fifth, and quite important objection, relates to scope of the subpoenas as to area. In general, the subpoenas specify that information be supplied for areas consisting not only of the six (including D.C.) states alleged as areas in the complaint, but also six nearby states (see Specification 1 a). The Howrey deponents insist in their stipulation on a limitation to the six city or metropolitan areas alleged and defined in the complaint. Some of the other movants also ask for a limitation in this direction. The examiner, in general, modifies the subpoenas so as to strike the six nearby states but to require the information for the six (including D.C.) states mentioned in the complaint plus the six city or metropolitan areas alleged and defined in the complaint (and encompassed by the latter six states). In two instances (Specifications 2 a-k and 3), however, the examiner excludes any "state" areas, and permits only city areas, as particularly desired by the Howrey deponents in all pertinent instances. In Specifications 1 b(2) and (4) he includes the "state" areas but without a county breakdown.

The examiner's modification as to area also, as already indicated, eliminates in large measure the objections to county breakdowns requested by the subpoenas, since the number of counties to be reported on are, of course, greatly reduced, as is the potential hardship, of county breakdowns, particularly complained of in two of the affidavits.

A sixth objection is that requested "quasi-merger" and "quasi-ownership" data (Specifications 2 and 3) are particularly irrelevant inasmuch as it has been held, in general, by Supreme Court authority, that, on the facts considered, it was no defense to challenged mergers that there was a prior concentrated or quasi-concentrated market even without the mergers. The examiner disallows the objection, citing as authority the Commission's Mississippi order of June 8, 1966, stating that a respondent is entitled to disclosure of data of this type to give it an opportunity to prove its legal theories.

A seventh objection is to requested data in respect to products which may possibly compete with cement (Specification 5). In general, the objection is that in any event a cement market is a sufficient product submarket according to Supreme Court authority. However, again the examiner holds that respondent is entitled to disclosure of the requested data so as to have the opportunity to prove its theories.

The various Specifications — including, where required, each subparagraph as a Specification — will now be examined one by one, and specific dispositions will be indicated by the examiner in respect thereto and in response to the motions to quash. This will be followed herein by the formal part of this order, which may be summarized as follows:

(A) Expressly directing that the modifications be made, i.e., as heretofore indicated.

(B) Providing for sending documents and information to an accounting firm wherever the Mississippi confidentiality procedure is directed.

(C) Directing that, under the Mississippi confidentiality procedure, information from other subpoenaed concrete firms should also go to the accounting firm.

(D) Directing that respondent's counsel adhere also to their own agreement of confidentiality, and their agreement not to oppose further confidentiality at the hearing — as contained in the stipulation herein.

(E) Providing that Specifications now disallowed, or only allowed subject to Mississippi procedure, shall serve as notice that the furnishing of the requested information may be pressed by way of discovery necessarily deferred until after commencement of the hearing, or by way of subpoenas returnable at the hearing.

(F) Directing that respondent may, after hearing commences, renew requests, now modified or disallowed, on a later proper request for discovery necessarily deferred. (See (E).)

(g) Noting that motions insofar as they request quashing of subpoenas, or request other relief not directly passed on, are deemed denied.

It will be noted that (E) and (F) above provide in effect that respondent may apply after the hearing commences for "discovery necessarily deferred during the prehearing procedures", as provided for under Section 3.41(b) of the Rules of the Commission.

This refers to Specifications now disallowed (or modified), involving reduction of requested areas or other requests. It also refers to Specifications only allowed subject to the confidentiality procedure of the Mississippi case.

It is also in effect further stated therein that respondent may also apply for requested information now denied or made subject to Mississippi procedure, by requesting subpoenas returnable at the hearing.

In respect to any future application under Section 3.41(b), reference is made to comments herein (pp. 23-24), although addressed there particularly in reference to Specifications subjected by this order to the confidentiality procedure of the Mississippi case.

Specification 1 a

Specification 1 a requests the name and location of each portland cement manufacturing plant and each terminal which shipped cement at any time during 1957-1966 into twelve states (counting the District of Columbia as a state). Six of these are expressly named as affected areas in the complaint, as amended (pars. 31-34), to wit, District of Columbia, Maryland, Virginia, Kentucky, Indiana, and Florida. Six of them are nearby states, to wit, West Virginia, Tennessee, Illinois, Ohio, Georgia, and Alabama.

The Howrey stipulation states that respondent agrees that the time-period in Specification 1 a may be limited to 1961-1966. -- This obviously reduces any burden or hardship as claimed, at least in reference to the subpoena generally, by most of the memoranda supporting the various motions to quash herein. The examiner goes along with it.

Said stipulation also states that the Howrey deponents agree to produce the documents called for by 1 a, so modified as to years, on the proviso that the subpoenas are limited to what are the six city areas expressly named and defined in the complaint (par. 1), to wit, Washington, Louisville, Lexington, Jacksonville, Orlando, and Miami.

Production of data is so "agreed" to in the stipulation by the Howrey deponents without any further proviso that production should be made only according to the confidentiality procedure in the Mississippi case. -- It is the examiner's opinion that none of the movants herein require, as to this Specification 1 a, the protection of the confidentiality procedure of the Mississippi case. Although the Howrey memorandum and most of the other memoranda argue for Mississippi confidentiality procedure as to all Specifications herein, at least in general, there is no particular stress in any of the memoranda on Specification 1 a.

As to area, it is true that the Dundee memorandum (pp. 1-2) actually mentions Specification 1 a in connection with strong objections as to area. However, it does so only, it seems, to make the objections to Specification 1 b(1)-(4), which refers back to 1 a. Looking at the realities, the examiner does not believe it is fair to respondent to limit respondent, as proposed by the Howrey deponents, to the city areas, in obtaining the information requested by 1 a. This is so even though a plausible, if not tenable, argument can be made for so limiting information in respect to certain other Specifications herein. After all, Specification 1 a is simply asking for the identification of plants and terminals making shipments into various named areas. The named areas happen to be the six (including D.C.) states named in the complaint, and six nearby states not named in the complaint.

The examiner does, however, go along with the proposition that respondent does not require the information in respect to the six nearby states. It is his opinion that, even without the information as to the additional states, respondent can live with its "agreed" modification as to years.

However, it is definitely the examiner's opinion that respondent in fairness is entitled to know the plants and terminals shipping into the six (including D.C.) states named in the complaint. These six, incidentally, encompass within their total area the six city areas named and defined in the complaint. In addition, respondent should have the information as to the six city areas, which perhaps are the truly vital controversial areas in this case.

The examiner notes that there are some general objections, in memoranda supporting motions to quash

herein, to the effect that the year 1966 is somewhat beyond the date of the last acquisition complained of, made in 1965. However, he disallows these objections as to this Specification, as well as to others. The post-acquisition time is slight. Moreover, post-acquisition evidence may have limited general relevancy.

Accordingly, Specification 1 a is hereby modified so as to be limited to the calendar years 1961-1966, and also to the six locations of District of Columbia, Maryland, Virginia, Kentucky, Indiana, and Florida, as well as the city areas of Washington, Louisville, Lexington, Jacksonville, Orlando, and Miami.

Specification 1 b(1)

Specification 1 b(1) requests -- as to plants and terminals identified in 1 a -- the annual productive capacity of plants and the storage capacity of terminals, in barrels of cement, on December 31, 1966.

The Howrey stipulation states that the Howrey deponents agree to produce the documents responsive to 1 b(1) provided the subpoenas are limited to what are the six city areas alleged in the complaint, i.e., the same proviso stated in respect to Specification 1 a.

As with 1 a, also, the Howrey stipulation does not make a further proviso that production of requested documents as to this Specification should be made only under the confidentiality procedure of the Mississippi case.

In general, the various memoranda herein make no special point of this Specification 1 b(1) as such.

However, the U.S. Steel memorandum (p. 9), and the very similar Flintkote Company memorandum, refer to the category "productive capacities" (which points to 1 b(1), and to other 1 b requested information) as "closely guarded secrets". The examiner cannot adopt this view, at least not for the purpose of preventing respondent from obtaining the information requested in 1 b(1). It may be noted that U.S. Steel, together with Flintkote, seem to be somewhat overzealous in presenting the argument of confidentiality, and in requesting very explicitly (Memorandum, p. 11) that, at a minimum, any material required to be submitted in response to any of the Specifications should be entitled to the confidentiality procedure of the Mississippi case.

The examiner believes that it is reasonably clear that annual productive capacity, or storage capacity of terminals, as requested by 1 b(1), does not require

Mississippi confidentiality procedure. Pressed to their logical conclusion, the arguments to the contrary would have the result that such information would never be ordered to be disclosed, even at the hearing itself, however compelling the reasons. Actually, respondent is already bound by its altogether adequate confidentiality agreement, and its agreement not to oppose appropriate applications for further protection at the hearing. These agreements by respondent are contained in the Howrey stipulation and are reproduced almost word for word in the closing paragraphs of the present order.

As with Specification 1 a -- which leads to 1 b, including present b(1) -- the examiner believes that the information should not be limited to the six city areas themselves, but should be limited merely to the six (including D.C.) states plus the six city areas encompassed by them.

Having permitted identification of the plants and terminals by both the six state and the six city areas, i.e., under Specification 1 a, as modified, the examiner feels that it is only fitting and appropriate that he permit capacity figures according to the same areas under modified Specification 1 b(1).

It may be noted in passing that out of the six (including D.C.) states named in the complaint Dundee insists that it serves only two at the most, namely Kentucky and Indiana. However, it is obvious that under modified 1 b(1) Dundee will not be required to submit information for any state or area not included in the named six, and, of course, it will on its facts have no figures to supply for plants not shipping into the six (including D.C.) areas, or the six city areas contained therein.

Accordingly, Specification 1 b(1) is hereby modified so as to be limited to the six locations, i.e., District of Columbia, Maryland, Virginia, Kentucky, Indiana, and Florida, and to the six city areas encompassed by them, Washington, Louisville, Lexington, Jacksonville, Orlando, and Miami.

Specification 1 b(2)

Specification 1 b(2) requires -- as to the plants identified in 1 a -- for each calendar year 1961-1966, the total shipments of portland cement, and a breakdown for each year of total shipments according to the county into which they were made.

The Howrey stipulation states that the Howrey deponents agree to produce responsive documents to Specification 1 b(2) on two provisos.

The first proviso is that the subpoenas are to be limited to what are the six city areas described in the complaint.

The second proviso is that the manner of production is subject to what is the confidentiality procedure of the Mississippi case.

The said stipulation contains no proviso directed against a breakdown into counties. This no doubt is explained by the fact that, under the Howrey formula, only the counties of the six city areas need be considered -- not the counties of 12 states, as would be required under the unmodified wording of 1 a, which in effect controls as to 1 b.

In this connection, it is well to note that the Howrey memorandum (p. 20) makes a point of the hardship and burdensomeness which would be involved in producing all the information required by unmodified Specification 1 b(2). The Marquette memorandum (p. 2) is very critical about a breakdown by counties, i.e., of 12 states, particularly in view of its nine different sales divisions, lack of county recording of customers, the cost involved, and other factors, all attested to by affidavit. The Dundee memorandum (p. 2), supported by affidavit, also complains, adding that its records are not kept by counties.

The examiner accordingly respects the obvious objective of the Howrey stipulation in limiting the county breakdown to counties within the six city areas. The espoused limitation seems in effect to be a very practical solution of the claims made in the various memoranda as to hardship and burdensomeness in connection with a county breakdown. Moreover, respondent cannot complain too much because of being limited to city areas (or metropolitan areas, as they are apt to be called), inasmuch as adjudicated cases and general Commission pronouncements seem to indicate quite clearly that such areas are the true "day-to-day" markets for cement suppliers. Matter of Diamond Alkali Company, D. 8572, October 22, 1935, p. 7.

However, in the examiner's opinion, this does not mean that respondent should not also be given the requested figures as to the six states (including D.C.), i.e., given the figures but with no further breakdown as to counties. The six are named in the complaint as, in effect, market areas. The states encompass the six city areas, which may truly turn out to be submarkets. To be sure, submarkets are recognized by case law and Commission pronouncement as, quite possibly, sufficient areas to test violations under Section 7 of the Clayton Act. However, this does not necessarily exclude market consideration of the states in which the city areas are part.

This disposes of the area questions and leaves over the question as to the demand in the Howrey stipulation, and in most of the memoranda of the moving parties, for confidentiality procedure of the Mississippi case, i.e., in respect to present Specification 1 b(2) asking about shipments.

It is the examiner's belief that, in order to be adequately prepared, both as to cross-examination during complaint counsel's case and in their own case-in-chief, respondent's counsel are entitled to obtain at this time the requested information, as modified, as to shipments of cement. Respondent has agreed in the Howrey stipulation to what, in the examiner's already expressed opinion, is reasonable confidentiality protection, and the wording of their agreement in this respect is made part of the latter portion of this order. The objecting movants contend that respondent's stipulation, or proposed stipulation, does not guarantee completely confidential treatment, particularly at the hearing itself. This is not a persuasive argument, inasmuch as there cannot be any guarantee of completely confidential treatment at the hearing itself, as various of the moving memoranda expressly make clear by pointing out that even in camera treatment, if accorded at the hearing, does not keep the information away from the respondent itself, as distinguished from its counsel in the case.

Accordingly, Specification 1 b(2) is hereby modified so that the subpoenas are limited to the six city areas alleged and defined in the complaint, but with a breakdown according to the county into which the shipments were made, and to the six encompassing states alleged in the complaint, as heretofore named, but without a breakdown according to counties.

The requested information need not be supplied, however, pursuant to the confidentiality procedure of the Mississippi case.

Specification 1 b(3)

Specification 1 b(3) calls for a further category breakdown of shipments reported pursuant to Specification 1 b(2). The further breakdown shows shipments according to types of purchasers, as follows:

(1) company terminals, (2) company divisions or subsidiaries, (3) ready-mixed producers

(4) concrete product producers, (5) contractors,
(6) building supply dealers, (7) federal, state and local governmental units

(8) all other purchasers.

The Howrey stipulation states that respondent agrees to accept the response without reference to the four intervening categories (4), (5), (6), and (7), i.e., limited to (1) company terminals, (2) company divisions or subsidiaries, (3) ready-mixed producers, and (8) all other purchasers.

The said stipulation also states that the Howrey deponents agree to produce the documents called for by Specification 1 b(3) as so modified, with two provisos:

The first proviso is that the subpoenas are limited to what are the six city areas alleged and defined in the complaint.

The second proviso is that production of documents or information be subject to the confidentiality procedure of the Mississippi case.

In the examiner's opinion, production of the four categories consented to by respondent eliminates the objections of hardship and burdensomeness made to the instant Specification in several of the memoranda (Howrey, p. 22; Marquette, pp. 2-3; and, more generally, Dundee, pp. 2-3; National Gypsum, p. 19).

Reducing the areas from 12 states to six metropolitan areas, as agreed or proposed in the stipulation by the Howrey deponents, would also serve to eliminate the claim of hardship and burdensomeness.

However, the examiner, as with the prior Specifications herein, feels that no substantial extra burden is imposed by directing that the areas be not only the six metropolitan areas but also the six states encompassing them and named in the complaint. It is pertinent to note in this connection that the Marquette memorandum (p. 9), although asking for a limitation to six metropolitan areas, also speaks for "regional and metropolitan" areas, at least at the cement level.

As to Mississippi confidentiality treatment, it is the examiner's opinion that the information requested by this Specification 1 b(3), in respect to shipments to various types or categories of purchasers, is not so vital at this time to respondent and respondent's requirements for trial preparation, as to require direct disclosure. It is his further opinion that disclosure under Mississippi procedure, limited as its usefulness is, may nevertheless, in respect to the instant Specification, make possible at least a useful preview of the kind of information respondent seeks. Respondent should be satisfied with receiving the information according to Mississippi procedure, at least for the present, but subject to respondent's general right,

accorded at the end of this order, to apply for further disclosure at the hearing, after complaint counsel's case-in-chief, or an appropriate portion thereof, has been submitted.

Accordingly, Specification 1 b(3) is hereby modified as follows. Mississippi confidentiality procedure applies.

The breakdown of shipments reported in response to Specification 1 b(2) shall be according to the following categories: (1) shipments to each company-operated distribution terminal, (2) other divisions or subsidiaries of the company, (3) ready-mixed concrete producers, and (4) all other purchasers.

The subpoenas are limited to the District of Columbia, Virginia, Maryland, Kentucky, Tennessee, and Florida, and to the six city (or metropolitan) areas defined in the complaint, to wit, Washington, Louisville, Lexington, Jacksonville, Orlando, and Miami.

Specification 1 b(4)

Specification 1 b(4) requests the name of each county into which shipments of portland cement were made during 1957.

The Howrey stipulation states that respondent agrees to substitute the year 1961 (i.e., in place of 1957). The examiner has, of course, no difficulty in going along with this.

The said stipulation also states that the Howrey deponents agree to produce the documents requested under this Specification on the proviso -- which is the only proviso -- that the subpoenas, so modified as to date, are limited to what are the six city areas defined in the complaint.

There is no proviso by the Howrey deponents, in this stipulation, requiring that production of documents under this Specification should be only pursuant to the confidentiality procedure of the Mississippi case. Actually, none of the memoranda herein, in requesting Mississippi confidentiality, stress Specification 1 b(4), even those of Dundee or of U.S. Steel and Flintkote, which very explicitly ask for the Mississippi procedure in respect to all Specifications, should any disclosure whatever be permitted.

The examiner sees no need, in respect to this Specification, for the confidentiality procedure of the Mississippi case. No such need in respect to this particular Specification has been shown. Accordingly, the examiner

goes along with the Howrey stipulation insofar as it omits any proviso for Mississippi confidentiality procedure.

The examiner also goes along with the Howrey proviso limiting this Specification as to area, except that the examiner believes that the information, without a county breakdown, should also be supplied for the six "state" areas named in the complaint, as amended.

More specifically, the examiner goes along with the Howrey stipulation insofar as it limits county information to the six city areas defined in the complaint. This eliminates the hardship objections expressed in the memoranda herein against county information (Howrey, pp. 20 ff.; Marquette, p. 2; and Dundee, pp. 2-3).

However, the examiner, consistent with his modifications of prior Specifications herein, and as already indicated, believes that the information should also be supplied for the six (including D.C.) states named in the complaint, but without a county breakdown.

Accordingly, Specification 1 b(4) is hereby modified as follows:

The year for the requested information shall be 1961 (instead of 1957).

The Specification (in requesting names and places into which shipments were made) shall be limited to the name of each county forming part of the six city areas named and defined in the complaint, as amended, to wit, Washington, Louisville, Lexington, Jacksonville, Orlando, and Miami -- and to the name of the "state" locations named in the complaint, to wit, District of Columbia, Virginia, Maryland, Kentucky, Indiana, and Florida, i.e., without naming the county.

Specification 2 a-k

Specification 2 a-k requests so-called "quasi-merger" information -- such as cement purchase debts not paid within 90 days, debts guaranteed by cement companies, cement leases on machinery of ready-mixed companies, sales of equipment by cement companies, ready-mixed salaries paid by cement companies, and the existence of common board members. The information is desired from January 1963 "to date", i.e., January 1968, date of subpoena.

This Specification has its counterpart in subpoenas duces tecum in this case addressed to ready-mixed concrete companies (Specification 4 a-k thereof), passed on by the examiner in his order dated May 29, 1968. The wording and content of the present Specification is the same as its "concrete" counterpart except as designed to make the

request for information applicable to cement companies, rather than to concrete companies.

As with its "concrete" counterpart, Specification 2 a-k represents the very same group of Specifications passed on by the Commission in the Mississippi case, except for the addition of Specification 2 g. The drafter of both the present Specification and its "concrete" counterpart has simply taken the wording of the Mississippi specifications and elaborated thereon.* It may also be noted that the Specifications are numbered differently than they are in the Mississippi order, where they are numbered (1)-(10).

The examiner, as will immediately appear, modifies this Specification 2 a-k essentially in the same way as he modified its "concrete" counterpart, except that he further modifies it, as expressly desired by the Howrey deponents in the stipulation, so as to make the Specification applicable only to the six city areas defined in the complaint, as amended. -- As with the "concrete" counterpart, the examiner modifies this Specification by making it subject to the proviso, as proposed by the Howrey deponents in their stipulation and by other movants herein, that production of documents or information should be subject to the confidentiality procedure of the Mississippi case.

* The Mississippi subpoenas, however, referred to debts not paid within 60 days (not 90 days, as here, in 2 a).

The Howrey stipulation states that respondent agrees to a modification -- as in the "concrete" subpoenas (there 4 a) -- that Specification 2 a shall apply only to a debt in excess of \$10,000, i.e., not paid within 90 days.* -- This meets the objection of hardship and burdensomeness raised by the Howrey memorandum herein as well as by some of the other memoranda. It may be noted in this connection that the National Gypsum memorandum (p. 17) suggests a dollar limitation.

The Howrey stipulation also states that respondent further agrees (as it similarly does in respect to the "concrete" Specification) that the wording "or concrete products" may be deleted, i.e., from Specifications 2 c and 2 d.

* There is a footnote to this portion of the Stipulation stating that respondent "will accept, without modifying the Specification, only those debts not paid within" 120 days on a deponent's notarized statement that it has no available list of debts on a 90-day basis.

The Howrey stipulation states, in turn, that the Howrey deponents agree to produce documents responsive to Specification 2 a-k, as modified — subject, however, to various provisos.

One proviso is that the subpoenas should be limited, in effect, to the six city areas defined in the complaint. -- As already indicated, the examiner goes along with this. It meets objections as to area raised by the Howrey moving memorandum and memoranda from other third parties herein. There are suggestions for limitations to local areas made by the Marquette memorandum (p. 9), the National Gypsum memorandum (p. 14), and the Dundee memorandum (p. 4). (The Dundee memorandum suggests that the area should be the one city market Dundee says it serves.)

A limitation to "the three local market areas as defined in the complaint", was followed by Examiner Tinley in the Mississippi case, Docket 8657, order dated April 28, 1966, pp. 6-7. The most substantial "day-to-day" competitive market of cement suppliers has been stated by the Commission to be the "local ready-mix market." Matter of Diamond Alkali, D. 8572, December 12, 1965, p. 7 (already cited herein).

The examiner has considered a less drastic limitation so that the Specification would be limited to and thus embrace not only the six city areas, but the six encompassing state areas, as has been done with some of the prior Specifications herein.

However, the examiner has decided against this. It is his opinion that respondent will obtain at least a sufficient sampling of this type of information from the city areas -- actually much more than a sampling if the city areas here are truly controlling as to the cement market.

There is a further proviso in the Howrey stipulation, in behalf of the Howrey deponents, that wherever the wording "cement purchaser" is used in this Specification 2 a-k it shall be deleted and the wording "ready-mix company" used in its place. Respondent expressly states in the stipulation that it does not agree to this proviso. -- The examiner does not sanction the proviso or the change contemplated. According to the Commission order of June 8, 1966 (p. 2) in the Mississippi case, the corresponding "concrete" Specification uses the wording "cement consumer" -- wording obviously acceptable to the Commission. This is sufficiently equivalent to "cement purchaser." The change proposed by the Howrey proviso would deprive respondent of requested information insofar as it concerns companies not engaged in the ready-mixed concrete business.

A further and formidable proviso in the Howrey memorandum is that production of the documents responsive to Specification 2 a-k shall be subject to the confidential procedure of the Mississippi case, i.e., subject to Paragraph 7 of the stipulation.

The examiner goes along with this proviso or limitation, which is in line with the Commission determination in the Mississippi case in respect to the subpoena Specifications there, which are almost the same as those in the present Specification 2 a-k. The proviso takes care of the objection in the Howrey memorandum that respondent's agreement of confidentiality is not sufficiently protective. The objection is also made, of course, by other third parties herein in their memoranda (Howrey (pp. 15-19), Dundee (pp. 3-4; 8-9), U.S. Steel (pp. 9-10) and Flintkote, Marquette (pp. 14-17), National Gypsum (pp. 11-12). There is also a comparable objection by Lone Star.

Although the examiner does not go along with any lack of confidence in respondent's confidentiality agreements, which are made a part of the general portion of this order, it is obvious that, short of an order to quash, objectors are in the best possible position if the Mississippi procedure is followed.

It may be interesting in this connection to consider the position of Lone Star, which agrees in its memorandum to all the Specifications of the present subpoenas except Specification 2 a-k now under consideration. The Lone Star memorandum (p. 1) asks that this Specification 2 a-k be stricken.

However, although the memorandum does not ask for the confidentiality procedure of the Mississippi case nor disparage the respondent's confidentiality agreements, the ground on which Lone Star seems to rely is, in the examiner's opinion, alleged confidentiality, if not ultra-confidentiality.

The memorandum (p. 3) states that the requested information generally falls under the heading of "customer financing", that such financing is done to assist small business "concrete" companies, and that if details of this leak out, such small business "concrete" companies — which, it is stated, must observe an appearance of financial stability through several protracted stages, i.e., of bid, award, commencement of construction, and completion (p. 4) — may easily lose the confidence of contractors, who will be induced to deal with integrated companies instead. In the examiner's opinion, there may be a substantial basis for what is stated in the memorandum, although there is no affidavit to support the memorandum or to verify objectively its statements. However, it is

the examiner's opinion that the confidentiality procedure of the Mississippi case — if not the confidentiality agreements of the respondent herein — protects against the very danger depicted by the memorandum. Moreover, the examiner is surprised not to have had the memorandum's eloquent argument advanced by the "concrete" companies themselves, i.e., in their motions to modify or quash the "concrete" subpoenas, rather than on a motion by a cement company to quash a "cement" subpoena.

Moreover, it is not only out of deference, as such, to the determination of the Commission made in Mississippi, but with the same "abundance of caution" noted by the Commission in its order (June 8, 1966, p. 4), that the examiner has concluded that Specification 2 a-k herein, like its counterpart in the "concrete" subpoenas, should be modified so as to provide for the confidentiality procedure followed in the Mississippi case.

The examiner arrives at this conclusion with full awareness of the 1967 amendment to the Rules of the Commission, as embodied in Section 3.34(b)(2), first sentence, which provides for general discovery (in addition to discovery for obtaining documents to be used in evidence), thus broadening the Rules and indicating a general disposition to broaden discovery, as well as providing an argument for softening confidentiality restrictions on disclosure.

However, should it turn out at the hearing that respondent truly needs some of the information requested in this Specification rendered unavailable to it by reason of the Mississippi confidentiality procedure — including use of this information for cross-examination or other general discovery — general provision is made in this order whereby the examiner, on the proper showing, may direct that the information be produced by way of discovery necessarily deferred, pursuant to Section 3.41(b) of the Rules, and may also direct the recalling of witnesses for further cross-examination.

After hearing complaint counsel's proof, respondent may well find that it does not need such further disclosure. Moreover, the examiner, after hearing this proof, will be in a better position to pass on the real necessity for further disclosure. At this prehearing stage the examiner is not in this position.

This case has been pending in the prehearing stage an overly long period. The examiner himself does not have an unlimited amount of time to finish this case, or any other. Reasonable expedition, as prescribed by Section 3.41(b) of the Rules, implies the adoption of practical techniques, consistent with law and fairness, to accomplish such expedition.

Accordingly, the further discovery sought by respondent may well be considered, in this particular case and under all the circumstances of this particular case, as "discovery necessarily deferred", under Section 3.41(b).

Another factor to be considered in this connection is the likelihood of avoiding time-consuming appeals, particularly in respect to the strong demands of movants herein for Mississippi confidentiality procedure, by a compromise which still preserves for respondent its right to ask later, at the hearing, for any further discovery desired by it.

One final objection is raised, to this Specification 2 a-k, by the National Gypsum memorandum (p. 18). The objection is that the information cannot be relevant after the date of the last merger in 1965, certainly not until as late as 1968. In the examiner's view, post-acquisition data is not too persuasive, but it may have "general relevancy" (Rule 3.34(a)(1)).

The Commission has directed the production of information as to other mergers for the years 1965, 1966, 1967, and 1968, i.e., in this case itself (order, dated May 14, 1968). The two respective situations are not entirely analagous, but respondent is given leeway as to alternative legal theories (Mississippi order, June 8, 1966, p. 4). Moreover, pre-acquisition data, particularly of this type, may not be truly intelligible unless weighed against post-acquisition data.

Accordingly, Specification 2 a-k is modified as follows:

Paragraph 2 a thereof is modified to read as follows:

- a. Any secured or unsecured debt in excess of \$10,000 (other than any debt incurred in the purchase of cement and paid within ninety (90) days* of the shipment of the cement with respect to which said debt was incurred), whether or not due, outstanding to this company by a cement purchaser.

Paragraphs 2 c and 2 d are modified so as to delete in each, the wording "or concrete products".

* Without modifying this Specification, it is understood that respondent will extend to all movants the same undertaking in its stipulation with the "Howrey" deponents as to acceptance by it of data as to debts not paid within 120 days on a notarized statement that deponent has no available list of debts on a 90-day basis.

Paragraph 2 a-k is further modified so as to be limited to the six city areas named and defined in the complaint, to wit, Washington, Louisville, Lexington, Jacksonville, Orlando, and Miami.

Paragraph 2 a-k is further modified so that the manner of production shall be pursuant to the confidentiality procedure of the Mississippi case.

Specification 3

Specification 3 requests the names and locations of all concerns which purchase portland cement (i.e., for making ready-mixed concrete or not) or purchase ready-mixed concrete, if 10% or more of the stock or assets of said concerns have been owned by the deponents at any time from January 1963 to date (i.e., date of subpoena, January 1968).

Specification 3 seeks to obtain the same kind of information as the corresponding "concrete" Specification (3 a-c, concrete), disposed of by the examiner's order dated May 29, 1968. In general, Specification 3 is disposed of in the same way as said "concrete" Specification, except that Specification 3 is limited to the six city areas defined in the complaint, as is Specification 2 a-k of the present "cement" Specification.

The Howrey stipulation states that the Howrey deponents agree to produce the requested documents, but only on three provisos.

One proviso is that the subpoenas be limited to what are the six city areas alleged and defined in the complaint, as amended. This is the same proviso made in respect to Specification 2 a-k. -- The examiner goes along with this proviso for the same reasons he has done so in respect to Specification 2 a-k. He also abstains from adding to these city areas the six encompassing state areas, again for the same reasons expounded in reference to Specification 2 a-k.

The second proviso in the Howrey stipulation, similar in result to that made in respect to Specification 2 a-k, is that the wording "which purchase portland cement" in present Specification 3 should be followed by the wording "for the production of ready-mix concrete." Again, respondent expressly states in the stipulation that it does not agree to the additional wording. -- The examiner again declines to adopt this Howrey proviso, and refers to his reasoning in declining to adopt the proposed proviso in respect to Specification 2 a-k (i.e., that "ready-mix purchaser" be substituted for "cement purchaser."

The third proviso in the Howrey stipulation is that the matter of production shall be subject to the confidentiality procedure of the Mississippi case — the same proviso as made in respect to Specification 2 a-k.

In respect to confidentiality or, more specifically, a claimed necessity for Mississippi confidentiality treatment, the examiner recalls no express attack on Specification 3 as such, either in the Howrey memorandum or any of the other memoranda herein. Even the Lone Star memorandum, which the examiner has construed to be basically an attack on the issue of confidentiality, is directed solely to Specification 2 a-k, and it never in any way criticizes Specification 3 or even mentions it except to state that the requested documents or information will be furnished.

In the examiner's opinion, there is ample protection — as to the documents and information called for by Specification 3 — in respondent's confidentiality agreements, which are included in the closing paragraphs of this order.

It should be emphasized that the "quasi-ownership" specification items of Specification 3, or of its "concrete" counterpart, are not in the subpoenas duces tecum of the Mississippi case. It is the examiner's opinion that "quasi-ownership" items of information are, at least presumably, entitled to a lesser degree of confidentiality protection than "quasi-merger" items, dealing mostly with lesser matters such as financing, or other indirect control, of concrete companies by a cement company. In any event, the examiner is not disposed to extend unduly the confidentiality doctrine of the Mississippi case, in view of his opinion that the anonymous and otherwise limited disclosure alone made possible by Mississippi procedure very substantially limits the value of the information.

As stated in the examiner's order of May 29, 1968, dealing with the corresponding "concrete" Specification, such a specification asks for fractional ownership information, closely analogous to information as to full ownership, i.e., full mergers. Such a Specification therefore presents a striking contrast to the "quasi-merger" specifications in the Mississippi case.

As further stated in the prior order, the requested information as to ownership of 10% or more is information as to an ultimate fact in a competitive universe subject to anti-merger law. To permit respondent to have this information now is far from permitting it to "rummage" through deponents' papers, as described by the Commission in the Mississippi case (Commission order on reconsideration, July 15, 1966, p. 2). A further reason for not

readily extending the confidentiality doctrine of the Mississippi case is the amendment, made in 1967, to the Rules of the Commission, allowing general discovery, for cross-examination and the like — in addition to discovery, as earlier allowed — for the precise purpose of obtaining material to be introduced in evidence (Section 3.34(b)(2)).

Moreover, the "quasi-ownership" data sought by Specification 3 is definitely analogous to the full ownership data on mergers, ruled on by the Commission herein in its order of May 14, 1968, referred to above in respect to Specification 2 a-k. (See page 15, supra.)

There is also the final objection to this Specification 3 (as with Specification 2 a-k) raised by the National Gypsum memorandum (p. 18), namely, that it asks for post-acquisition data even until 1968. The examiner rejects the objection for much the same reason stated by him herein for Specification 2 a-k.

Accordingly, Specification 3 is modified so that the subpoenas are limited to the six city areas alleged and defined in the complaint, as amended.

(However, production of the requested information and documents shall not be according to the confidentiality procedure of the Mississippi case, as requested in the motions herein.)

Specification 4

Specification 4 asks for originals or copies of statements, correspondence and communications — or memoranda as to telephone calls or conversations — between deponent and any representation of the Federal Trade Commission regarding the acquisitions complained of in the complaint, as amended. (Responses to Federal Trade Commission subpoenas and correspondence thereto are excepted.) The documents are desired commencing January 1965 to date, i.e., to January 1968.

As to this Specification 4, the Howrey stipulation states that the Howrey deponents adhere to legal objections set forth in the motion to quash dated February 8, 1967, and the supporting memorandum (pp. 13-15) dated February 29, 1968. Nevertheless, the stipulation contains the following declaration: "However, for the purpose of expediting this matter deponents hereby state that none of them has any documents responsive to Specification 4." -- Accordingly, the examiner deems the objections to Specification 4 by the Howrey deponents to be moot as to them, just as in his prior order he regarded the Howrey objections to the

corresponding "concrete" Specification as moot. Moreover, he does not regard the Howrey memorandum persuasive as to Specification 4.

Furthermore, in respect to this Specification 4, the examiner finds nothing whatever thereon, certainly nothing specific, either in the other motions now being considered, in the memoranda supporting them, or in the supporting affidavits. If there is some indirect reference to Specification 4 or its subject matter in these other motions or the supporting papers, it must be only in a general claim somewhere that the subpoenas as a whole call for irrelevant information. Conceivably, it might also be that such an indirect reference is implied in the rather extensive material therein claiming confidentiality; however, none of this material even mentions communications with the Federal Trade Commission, or related memoranda, or Specification 4 as such.

Accordingly, the examiner feels justified in ruling that nothing is shown in these other motions and in their supporting papers justifying objections to Specification 4.

However, before actually ruling thereon, the examiner will examine the Howrey papers since these are the only ones addressing themselves with any directness to Specification 4 and its subject matter — even though, as already noted, the Howrey stipulation states that none of the Howrey deponents have any of the documents called for by Specification 4.

The Howrey motion or motion paper itself deserves little consideration in this connection since it contains only summary and naked conclusions directed to the subpoena as a whole.

The Howrey memorandum* (pp. 14-15) simply states that the documents called for by Specification 4 are "clearly irrelevant", that "they are all hearsay statements", and therefore "inadmissible." -- The examiner disagrees. The requested documents have at least "general relevancy", i.e., under Section 3.34(b)(1) of the Rules of the Commission.

The Howrey memorandum (p. 14) also adds that the only justification for these documents would be for impeachment purposes at the hearing in cross-examination of witnesses, when (presumably, under the Jencks Rule) respondent could obtain them from the Commission, or its counsel. -- The examiner is not in accord with the implied objection. Specification 4 is not seeking documents in the Commission's possession, but in the deponent's possession. Most of

* There is no supporting affidavit.

these, presumably, would be copies, i.e., of correspondence and the like, sent to the Commission. Only a few, presumably, would be originals, i.e., memoranda made by deponent of telephone calls to, or conversations with, Commission personnel. As to copies, it would seem that the Jencks Rule is not invoked merely by the fact that the Commission has the original which is subject to the Jencks Rule. The principle of this has been decided in connection with copies of reports to the Census Bureau, the originals of which are protected from disclosure. St. Regis Paper Co. v. United States, 368 U.S. 208, 218 (1961). As to originals (to wit, memoranda) in a deponent's possession, the Jencks Rule cannot possibly be involved.

As is stated by the examiner in his prior order (p.6), referring to the corresponding "concrete" Specification, he recognizes that the Commission, as a matter of policy, so as not to discourage communications with it, might feel some reluctance about a direction for the production of even copies not in its possession. However, again as stated in his prior order in respect to the corresponding "concrete" Specification, the examiner feels that the showing of opposition to production is too meager to warrant any special indulgence in behalf of objecting deponents.

The examiner also discerns no reason, particularly in the absence of definite objection and showing in respect to Specification 4, to reduce the time period, 1965-1968, for which the subpoena requests that the documents be produced. Actually, for this type of requested disclosure, the year spread seems appropriate, particularly for the use in cross-examination.

Accordingly, the examiner declines to modify or quash Specification 4.

Specification 5 a-b

Specification 5 a-b, which deals with the question of other products, requests for the years 1963-1966 (a) the name of each construction product (clay, glass, gypsum, etc.) shipped by deponent into any of the twelve (including D.C.) states listed in Specification 1 a, and also requests for said years (b) as to each such construction product, the value of such products shipped.

The Howrey stipulation states that respondent agrees that Specification 5 a-b may be limited to 1966 (instead of being for 1963-1966).

The Howrey stipulation further states that respondent also agrees that if the value of construction products listed in response to Specification 5 a exceeds 5% of the

total sales of any deponent, such deponent* will submit, for 1966, documents or a verified summary disclosing for such deponent the value of such construction products shipped.

The Howrey stipulation states that the Howrey deponents agree to produce responsive data to Specification 5 a and b, as modified — but subject to the proviso that the data be limited to what are the six city areas alleged and defined in the complaint.

It may be noted that the Howrey memorandum (pp. 10-12) makes its objections to Specification 5 a-b on the ground that data for other related products is irrelevant, i.e., used for the purpose of establishing a broader product market. It cites Brown Shoe Company v. United States, 370 U.S. 294, 325 (1962), in this connection, for the proposition that a product submarket will suffice for the purpose of measuring competitive effect. The U.S. Steel memorandum (pp. 7-8), and Flintkote, make the same point. However, the Commission has ruled that a respondent is or may be entitled, by way of discovery, to prehearing data supporting any of its legal theories (Mississippi order, June 8, 1966, p. 4).

Corroborating the Howrey objection that the area specified in the complaint is too broad, the National Gypsum memorandum (p. 15) makes mention of the fact that this Specification 5, by its wording, is not limited as to area at all.

As to confidentiality, only the U.S. Steel memorandum (p. 6), and Flintkote, make a direct objection that the material called for by Specification 5, as such, is confidential.

The above references to objections in the papers of the various movants herein reflect the only explicit objections therein to Specification 5, or its subject matter, that the examiner recalls.

Accordingly, it is the examiner's opinion that the Howrey stipulation, bearing in mind its reciprocal express undertaking in respect to Specification 5, represents the maximum modification that any of the various movants herein can reasonably expect or merit.

In general, the examiner, due to the exigencies, is inclined to go along with the Howrey stipulation,

* For a special reason noted in the stipulation, the response of Bessemer Cement Company is limited to the Bessemer Cement Division of Diamond Alkali Company as it existed in 1966.

particularly in respect to Specification 5 a-b, as suggesting a plan fair to all movants and to respondent. The examiner does regard the deponent agreements in the stipulation as rather restrictive in respect to respondent's requests in Specification 5 a-b, and more restrictive than those in the Howrey "concrete" stipulation as to the corresponding "concrete" specification. However, it is the examiner's belief that respondent should be able to obtain what general data as to other products it really needs for trial preparation without unduly tapping deponents for the data requested.

Nevertheless, the examiner will provide that the area be broader than the area stated in the Howrey stipulation, i.e., he will direct that it be limited not to the six city areas stated in the stipulation, but that the data should also be given for the six (including D.C.) encompassing states, to wit, District of Columbia, Maryland, Virginia, Kentucky, Indiana, and Florida.

Accordingly, Specification 5 a-b is modified as follows: The data called for shall be for the calendar year 1966 (instead of calendar years 1963-1966).

The data shall be supplied only for the six city areas stated and defined in the complaint, as amended, to wit, Washington, Louisville, Lexington, Jacksonville, Orlando, and Miami, and for the District of Columbia, Maryland, Virginia, Kentucky, Indiana, and Florida.

If the value of construction products listed in response to Specification 5 a-b exceeds 5% of the total sales of any deponent, such deponent* will submit the documents, or verified summary, calling for disclosing for such deponent the value of such construction products shipped.

Deponents will produce responsive data to Specification 5 a and b as above modified.

* For a special reason noted in the Howrey stipulation, the response of Bessemer Cement Company is limited to the Bessemer Cement Division of Diamond Alkali Company as it existed in 1966.

IT IS HEREBY ORDERED:

(A) The Specifications in the "cement" subpoenas served on the present movants herein are hereby modified as set forth above in the emphasized portion devoted to each Specification, or each part thereof.

(B) Wherever Specifications are modified, in accordance with (A), supra, to prescribe the confidentiality procedure followed in the Mississippi case, any material submitted in response to the subpoenas shall be submitted, not to respondent or respondent's counsel, but to a reputable and disinterested accounting firm, to be selected by the hearing examiner in consultation with the parties. The accounting firm shall compile and present the material to respondent's counsel in such manner that no individual company's confidential arrangements or data will be revealed. This shall be in addition to the protective provisions in par. (D) of this order.*

(C) Wherever Mississippi procedure is directed, as governed by (B), supra, the following shall also govern:

Respondent's counsel shall also submit to the accounting firm all of the information of like kind which has heretofore been, or may hereafter be, supplied to them in response to any of the subpoenas directed to cement firms herein, i.e., even those not included among present movants.

(D) Such confidentiality treatment pursuant to the procedure followed in the Mississippi case as is directed herein shall be in addition to any confidentiality heretofore agreed to by respondent's counsel with any cement company herein, or counsel therefor; and in respect to

* This paragraph follows very closely the wording of the Commission's order in the Mississippi case, June 8, 1966, pp. 4-5.

present movants such confidentiality under the Mississippi procedure shall be in addition to the following:

(1) Unless and until offered in evidence as exhibits in the proceeding herein, and subject to further order by the examiner, all documents, correspondence, data, and verified summaries submitted by deponents to respondent's counsel herein in response to the subpoenas duces tecum will be kept strictly confidential, for use only by independent legal counsel for respondent Lehigh Portland Cement Company, or by counsel's technical experts not regularly employed by respondent Lehigh, as counsel for respondent may deem necessary in connection with their preparation for this adjudicative proceeding — provided, however, that any documents designated as trial exhibits by counsel for respondent may be disclosed to complaint counsel pursuant to prehearing procedures in this case.

(2) Respondent's counsel shall not oppose any appropriate request or motion by deponents to the examiner, in connection with any offer in evidence of such materials, protecting against public disclosure of any materials submitted by deponents in response to the subpoenas duces tecum.*

(E) Specifications of subpoenas modified herein — whether as to content, the prescribing of Mississippi

* Subparagraphs (1) and (2) follow very closely the wording of the last two paragraphs in the "Howrey" stipulation as to the "cement" subpoenas (as well as the companion stipulation as to the "concrete" subpoenas).

confidentiality, or otherwise — shall serve as notice to counsel for movants of respondent's probable intent to procure the requested documents and information through discovery necessarily postponed at any interval in the hearing that may be allowed for that purpose, or by way of new subpoenas duces tecum returnable at the hearing itself.

(F) The modifications hereby ordered shall be without prejudice to respondent's right, after completion of complaint counsel's case-in-chief, or a substantial and relevant portion thereof, to apply for information requested in the original Specifications herein, but not furnished or directly furnished to respondent's counsel by reason of the modifications, i.e., to apply for this relief by way of discovery necessarily deferred under Section 3.41(b) of the Rules, and possible recall of witnesses for cross-examination, if proper showing is made.

(G) Motions insofar as they ask for the quashing of subpoenas or make other requests not expressly disposed of by this order, are deemed denied.



Joseph W. Kaufman,
Hearing Examiner

June 14, 1968

Summary ofCEMENT SUBPOENA SPECIFICATIONS

1.

Shipments

a.-1957-1966 (at any time):

Manufacturing plants and terminals
shipping into:

- . states named in complaint
- . certain nearby states

b.-1963-1966 (annually):

- (1) Capacity of said plants and terminals
- (2) Shipments by barrels - county breakdown
- (3) Further breakdown: 8 categories of purchasers

1957 only:

- (4) Counties (names) into which shipped

#

2.-1963-1967

"Quasi-merger" items

a.

(a through k: - Loans unpaid
90 days; guaranteed loans;
machinery obtained from cement
company; capital contributions;
board control; etc.)

k.

3.-1963-1967

10% ownership

By this company, of cement or ready-mixed buyers

#

4.-1965-1967

Copies of communications, etc., with FTC

5.-1965-1967

Various construction products shipped

a. Names of products

b. Value (by product) §

[EXHIBIT 6]

[Caption Omitted in Printing]

**ORDER OF REMAND TO
HEARING EXAMINER**

Upon consideration of the appeals of respondent and fourteen third party concrete companies from the hearing examiner's rulings of May 29, 1968, and June 14, 1968, and for the reasons stated in the accompanying opinion:

IT IS ORDERED that this matter be remanded to the hearing examiner for further consideration.

By the Commission, with Commissioner MacIntyre not participating.

ISSUED: August 2, 1968

Joseph W. Shea
Joseph W. Shea,
Secretary.

[Caption Omitted in Printing]

OPINION OF THE COMMISSION

This matter is before the Commission upon the appeals of respondent and fourteen third parties. On January 11, 1968, subpoenas duces tecum were issued to eighty-one ready-mixed concrete companies on behalf of respondent. On January 25, 1968, thirty-six additional subpoenas duces tecum were issued to portland cement manufacturers on behalf of respondent. Subsequently, forty-seven ready-mix firms and twenty-two portland cement manufacturers complied with the subpoenas. Motions to quash were filed by twenty-nine ready-mix firms and thirteen portland cement firms. 1/

All third-party motions to quash claimed that some of the information sought by various subpoena specifications was highly confidential and should not be divulged to respondent or respondent's counsel but only to an independent accounting firm in accordance with the procedure utilized in Mississippi River Fuel Corporation, Docket No. 8657 (orders issued June 8, 1966, and July 15, 1966). The portland cement firms also claimed that the subpoenas were unduly broad as to geographic scope.

On May 29, 1968, the examiner ruled on the motions to quash the January 11, 1968, subpoenas, and on June 14, 1968, he ruled on the motions to quash the January 25, 1968, subpoenas. The examiner ruled that the subpoenas should be modified and that much of the sales and pricing data called for by various specifications should be submitted to a disinterested accounting firm which would compile and present the material to respondent's counsel in such a manner that no individual company's confidential arrangements or data would be revealed. The examiner also ordered that the geographic scope of the subpoenas directed to the portland cement manufacturers should be restricted.

Respondent filed two appeals from these rulings on the primary ground that the restrictive Mississippi River confidentiality procedure impairs respondent's right to prepare adequately for cross-examination and needlessly prejudices respondent's ability to conduct an effective defense, especially when sufficient protection can be afforded by other, less prejudicial means. Many third parties filed answers defending the examiner's ruling. Additionally, fourteen third parties also filed appeals on the ground that the examiner should have included even more subpoena specifications in the Mississippi River treatment ordered.

1/ Six firms receiving subpoenas had neither filed motions nor fully complied with the subpoenas as of the dates of the examiner's rulings on the motions to quash.

The examiner stated in his orders that inasmuch as some of the specifications in this proceeding are similar to those at issue in the Mississippi River case, and despite some misgivings as to the propriety of this treatment in this instance, he nevertheless was bound by Commission precedent to order the use of the same procedures. 2/

We believe that the examiner has incorrectly interpreted our decisions in the Mississippi River case. The Commission in that case neither stated nor implied that henceforth such treatment was to be mandatory. We merely held that under the facts of that proceeding the treatment ordered was appropriate. The Commission was, and is, loath to substitute its judgment for the examiner's judgment on such matters. This requires, however, that the examiner must actively and independently evaluate all of the countervailing factors in reaching his decision. The examiner, because of his proximity to the case, is, in the first instance, in a far better position to assess the multitude of variables inherent in the delicate balancing of interests between the respondent's need to know sensitive information and the third party's need to protect the same valuable information from his competitor. It is indeed conceivable that, depending on the particular facts, similar specifications may require dissimilar treatment in order to insure the most equitable resolution of these conflicting interests. Because of the examiner's misconstruction of the Mississippi River opinions, we are not convinced that such evaluation has been given to this matter.

Neither the Commission nor the courts have given recognition to an absolute trade secret privilege. 3/ The revelation of a trade secret will be compelled if it is indispensable to the proceeding. 4/ Nevertheless, the Commission and the courts have hesitated to order disclosure absent a clear showing of immediate need for the requested information. Once disclosure is deemed necessary, conditions have usually been imposed which limit the use of the information only to the litigation and which prevent disclosure to nonparty competitors. 5/

2/ Order Modifying Subpoenas Duces Tecum, p. 4 (May 29, 1968), p. 5 (June 14, 1968).

3/ See generally, E. Gellhorn, The Treatment of Confidential Information by the Federal Trade Commission: The Hearing, 116 U. Pa. L. Rev. 401 (1968).

4/ Federal Trade Commission v. Frederick A. Clarke, 3 S. & D. 406 (S.D. Cal. 1941), aff'd, 128 F.2d 542 (9th Cir. 1942).

5/ E. Gellhorn, supra note 3, at 409.

The techniques by which protection has been provided vary as much as the subjects protected. The procedure adopted in Mississippi River has been used on a number of occasions. ^{6/} Nevertheless, it is not the only available solution. At this juncture, we are uncertain that the examiner gave adequate consideration to whether all the information at issue was entitled to protection and, if so, whether the Mississippi River treatment provides the best available resolution to the opposing interests of the respondent and the third parties.

The test to apply to requests for confidential protection of business records and trade secrets is whether public disclosure will cause a clearly defined serious injury. It has been suggested that, for a fair resolution of a business secret claim, an examiner should consider, in determining whether disclosure will cause serious injury, such factors as:

1. How many people have knowledge of the supposedly "secret" information? Will disclosure increase that number significantly?
2. Does the contested information have any value to the possessor? To a competitor? Is that value substantial?
3. Did the party possessing the information incur any expense in this development? Has he had a sufficient opportunity to realize an adequate return on that investment?
4. What damage, if any, would the possessor of the secret suffer from its disclosure? What advantages would his competitors reap from disclosure?
5. What benefits are likely to flow from disclosure? To whom? Are they significant? In this connection, what is the public "need" for disclosure? Can it be satisfied in any other way? ^{7/}

^{6/} See, e.g., Cities Service Oil Co. v. Celanese Corporation, 10 F.R.D. 458 (D. Del. 1950); Empire Rayon Yarn Co. v. American Viscose Corp., 160 F. Supp. 334 (S.D.N.Y. 1958).

^{7/} E. Gellhorn, supra note 3, at 422-423. The intriguing suggestion has also been offered that to protect the Commission's concern about an incomplete public record, while also preventing unwarranted disclosure, the party seeking protection could be required to prepare a non-confidential summary of the document or testimony for inclusion in the public record. Id.

Because of the possibility that the examiner's impending mandatory retirement might have occurred prior to the completion of this litigation, the parties have recently agreed to the substitution of a new hearing examiner. Under the circumstances, we believe it appropriate to return this matter to the new examiner for reconsideration. 8/ An appropriate order will be entered.

Commissioner MacIntyre did not participate

August 1, 1968

8/ The examiner appears to have given adequate consideration to the geographic scope of the subpoenas addressed to portland cement companies. However, in light of our disposition of the primary basis for these appeals, we believe it is appropriate to give the new examiner an opportunity to make his own judgment on this aspect also.

[EXHIBIT 7]

[Caption Omitted in Printing]

**ORDER DIRECTING THIRD-PARTY CEMENT AND READY-MIXED
CONCRETE MANUFACTURERS TO COMPLY WITH THE
EXAMINER'S ORDERS MODIFYING SUBPOENAS ISSUED
IN RESPONDENT'S BEHALF IN THIS PROCEEDING**

On July 2, 1968, the undersigned examiner was designated and appointed to perform all duties authorized by law, in the place and stead of Joseph W. Kaufman, hearing examiner heretofore appointed.

On January 11, 1968, subpoenas duces tecum were issued to 81 ready-mixed concrete companies on behalf of respondent. On January 25, 1968, 36 additional subpoenas duces tecum were issued to portland cement manufacturers on behalf of respondent. Subsequently, 47 ready-mix firms and 22 portland cement manufacturers complied with the subpoenas. Motions to quash were filed by 29 ready-mix firms and 13 portland cement firms.

All third-party motions to quash claimed that some of the information sought by various subpoena specifications was highly confidential and should not be divulged to respondent or respondent's counsel but only to an independent accounting firm in accordance with the procedure utilized in Mississippi River Fuel Corporation, Docket No. 8657 (orders issued June 8, 1966, and July 15, 1966). The portland cement firms also claimed that the subpoenas were unduly broad as to geographic scope.

On May 29, 1968, Examiner Kaufman ruled on the motions to quash the January 11, 1968, subpoenas, and on June 14, 1968, he ruled on the motions to quash the January 25, 1968, subpoenas. The examiner ruled that the subpoenas should be modified and that much of the sales and pricing data called for by various specifications should be submitted to a disinterested accounting firm which would compile and present the material to respondent's counsel in such a manner that no individual company's confidential arrangements or data would be revealed. The examiner also ordered that the geographic scope of the subpoenas directed to the portland cement manufacturers should be restricted.

Respondent filed two appeals from these rulings on the primary ground that the restrictive Mississippi River 1/ confidentiality procedure impairs respondent's right to prepare adequately for cross-examination and needlessly prejudices respondent's ability to conduct an effective defense, especially when sufficient protection can be afforded by other, less prejudicial means. Many third parties filed answers defending the examiner's ruling. Additionally, 14 third parties also filed appeals on the ground that the examiner should have included even more subpoena specifications in the Mississippi River treatment ordered.

The examiner stated in his orders that inasmuch as some of the specifications in this proceeding are similar to those at issue in the Mississippi River case, and despite some misgivings as to the propriety of this treatment in this instance, he nevertheless was bound by Commission precedent to order the use of the same procedures.

The Commission on August 1, 1968, issued an order remanding the matter to the new examiner for reconsideration. The undersigned examiner has carefully reviewed all of the documents above referred to and is of the opinion that the orders issued by Examiner Kaufman dated May 29, 1968, and June 14, 1968, directing compliance with the subpoenas as modified must be complied with and that all of the information requested by the respondent be submitted without Mississippi River treatment. Counsel for respondent has made it abundantly clear that he will not disclose the information supplied 2/.
Now, therefore, //

1/ Matter of Mississippi River Fuel Corporation, D. 8657, Order of Commission, dated June 8, 1966, pp. 4-5.

2/ U.S. vs Lever Brothers Company and Monsanto Chemical Company, Civil Action No. 135-219, Protective Order issued April 14, 1961. F.T.C. vs Lone Star Cement Corporation, D. 8585, Protective Order for third party Atlantic Cement Company, Inc., issued October 28, 1964.

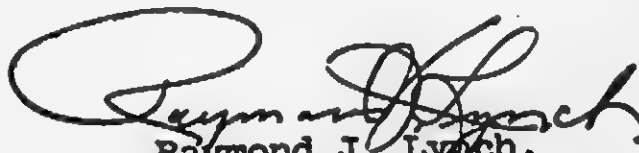
IT IS HEREBY ORDERED that to assure that counsel for Lehigh Portland Cement Company will not use the data subpoenaed for an improper competitive purpose, the documents and information furnished by third parties to the attorney for Lehigh in response to the subpoenas as modified by Examiner Kaufman's orders dated May 29, 1968, and June 14, 1968, shall not be disclosed to Lehigh personnel.

IT IS FURTHER ORDERED that the data and documents produced by third parties pursuant to the subpoenas shall be disclosed or made available by respondent's counsel to counsel supporting the complaint only to the extent that the information is to be used in respondent's defense.

IT IS FURTHER ORDERED that no copies shall be made of any of said materials, except those to be used as exhibits in the hearing in the above matter and copies may be made and used only for such purpose; That said materials furnished by third parties and any copies made of aforesaid (except copies or originals which may become a part of the official record in this matter), shall be returned to third parties promptly following the close of the hearings in the above matter.

IT IS FURTHER ORDERED that, until further order of this examiner, the information furnished by third parties under the subpoenas is not to be made public.

IT IS FURTHER ORDERED that all third parties subject to the subpoenas duces tecum referred to above submit the information requested therein either by mailing the same to the respondent's counsel or by submitting the material to respondent's counsel at 10:00 A.M., on October 24, 1968, in Room 7312 of The 1101 Building, 11th Street and Pennsylvania Avenue, N. W., Washington, D. C.


Raymond J. Lynch,
Hearing Examiner.

September 24, 1968.

[EXHIBIT 8]

[Caption Omitted in Printing]

ORDER DENYING
INTERLOCUTORY
APPEALS

Upon consideration of the appeals of 38 third parties from the hearing examiner's order of September 24, 1968, and for the reasons stated in the accompanying opinion:

IT IS ORDERED that the third-party appeals from the September 24, 1968, order of the hearing examiner directing third-party cement and ready-mixed concrete manufacturers to comply with the examiner's order modifying subpoenas duces tecum issued in respondent's behalf be, and they hereby are, denied.

IT IS FURTHER ORDERED that this matter be, and it hereby is, remanded to the hearing examiner in order that he may set a new effective date for his order of September 24, 1968, and for such other further proceedings as may be appropriate.

By the Commission, Commissioner MacIntyre not participating.


Joseph W. Shea,
Secretary.

ISSUED: November 22, 1968

[Caption Omitted in Printing]

OPINION OF THE COMMISSION

This matter is before the Commission upon the appeals of numerous third parties. 1/

1/ The following interlocutory appeals from the hearing examiner's order have been filed:

- (a) Memorandum in Support of Appeal by Ready-Mix Companies from the Hearing Examiner's Order of September 24, 1968 (October 21, 1968) (14 firms);
- (b) Memorandum in Support of Appeal to Commission from Hearing Examiner's Order of September 24, 1968 (October 21, 1968) (15 firms);
- (c) Memorandum in Support of Appeal by Six Cement Companies from the Hearing Examiner's Order of

(footnote continued)

On January 11, 1968, subpoenas duces tecum were issued to 81 ready-mixed concrete companies on behalf of respondent. On January 25, 1968, 36 additional subpoenas duces tecum were issued to portland cement manufacturers on behalf of respondent. Subsequently, 47 ready-mix firms and 22 portland cement manufacturers complied with the subpoenas. Motions to quash were filed by 29 ready-mix firms and 13 portland cement firms.

All third-party motions to quash claimed that some of the information sought by various subpoena specifications was highly confidential and should not be divulged to respondent or respondent's counsel but only to an independent accounting firm in accordance with the procedure utilized in Mississippi River Fuel Corporation, Docket No. 8657 (orders issued June 8, 1966, and July 15, 1966). The portland cement firms also claimed that the subpoenas were unduly broad as to geographic scope.

On May 29, 1968, the original hearing examiner ruled on the motions to quash the January 11, 1968, subpoenas, and on June 14, 1968, he ruled on the motions to quash the January 25, 1968, subpoenas. The examiner ruled that the subpoenas should be modified and that much of the sales and pricing data called for by various specifications should be submitted to a disinterested accounting firm which would compile and present the material to respondent's counsel in such a manner that no individual company's confidential arrangements or data would be revealed. The examiner also ordered that the geographic scope of the subpoenas directed to the portland cement manufacturers should be restricted.

Respondent filed two appeals from these rulings on the primary ground that the restrictive Mississippi River 2/ confidentiality procedure impairs respondent's right to

1/ (Continued)

- September 24, 1968 (October 21, 1968);
- (d) Memorandum in Support of Appeal of Marquette Cement Manufacturing Company from the Hearing Examiner's Order of September 24, 1968 (October 21, 1968);
- (e) Appeal by National Gypsum Company from Order Directing Third-Party Cement and Ready-Mixed Concrete Manufacturers to Comply with the Examiner's Orders Modifying Subpoenas Issued in Respondent's Behalf (October 7, 1968); and
- (f) Appeal of Dundee Cement in Response to Order Directing Third-Party Cement and Ready-Mix Concrete Manufacturers to Comply with the Examiner's Orders Modifying Subpoenas Issued in Respondent's Behalf in this Proceeding (October 7, 1968).

2/ Mississippi River Fuel Corporation, Docket 8657 (order issued June 8, 1966), pp. 4-5.

prepare adequately for cross-examination and needlessly prejudices respondent's ability to conduct an effective defense, especially when sufficient protection can be afforded by other, less prejudicial, means. Many third parties filed answers defending the examiner's ruling. Additionally, 14 third parties also filed appeals on the ground that the examiner should have included even more subpoena specification in the Mississippi River treatment ordered.

The examiner stated in his orders that inasmuch as some of the specifications in this proceeding are similar to those at issue in the Mississippi River case and despite some misgivings as to the propriety of this treatment in this instance, he nevertheless was bound by Commission precedent to order the use of the same procedures.

The Commission on August 1, 1968, issued an order remanding the matter to the new examiner for reconsideration. In our opinion remanding this matter, we stated inter alia:

We believe that the examiner has incorrectly interpreted our decisions in the Mississippi River case. The Commission in that case neither stated nor implied that henceforth such treatment was to be mandatory. We merely held that under the facts of that proceeding the treatment ordered was appropriate. The Commission was, and is, loath to substitute its judgment for the examiner's judgment on such matters. This requires, however, that the examiner must actively and independently evaluate all of the countervailing factors in reaching his decision. The examiner, because of his proximity to the case, is, in the first instance, in a far better position to assess the multitude of variables inherent in the delicate balancing of interests between the respondent's need to know sensitive information and the third party's need to protect the same valuable information from his competitor. It is indeed conceivable that, depending on the particular facts, similar specifications may require dissimilar treatment in order to insure the most equitable resolution of these conflicting interests. Because of the examiner's misconstruction of the Mississippi River opinions, we are not convinced that such evaluation has been given to this matter. 3/

Following the Order of Remand, appellants cited no additional facts and filed no further briefs with the hearing examiner. On September 24, 1968, after having "carefully reviewed all the documents," pleadings and rulings pertaining

3/ Lehigh Portland Cement Company, Docket 8680 (order issued August 2, 1968), p. 3.

to these discovery questions, the examiner ordered appellants to comply with the subpoenas duces tecum. 4/

Although the examiner declined to order the requested Mississippi River treatment for the third-party data, the examiner did fashion a protective order which restricted disclosure of the information at issue to respondent's trial attorneys. Furthermore, to assure against any possibility that the particular information sought in this case would be used for any competitive purpose, the examiner ordered that the data could only be made available to complaint counsel to the extent that the information is to be used in respondent's defense; that no copies shall be made of the materials except those to be used as exhibits in the hearing; that all materials which do not become a part of the official record will be returned to the third parties; and that no information will be made public until further order of the examiner. 5/

Appellants' objections to this order of the examiner are the same as those raised against the previous examiner's orders. In essence, the appellants assert that requested information dealing with financial relationships between cement manufacturers and ready-mixed concrete firms is trade secret information whose disclosure to respondent Lehigh or to the trade at large would cause irreparable injury to appellants. 6/

This Commission can appreciate the serious consequences of unwarranted disclosure of sensitive business information. However, it seems clear to us that the examiner has carefully considered our previous opinion (quoted in part above) remanding the prior appeals on the identical issues. The examiner's order indicates a thoughtful and workable balancing of the conflicting interests inherent in any such situation. On the one hand, the September 24, 1968, order has provided

4/ Order Directing Third-Party Cement and Ready-Mixed Concrete Manufacturers to Comply with the Examiner's Orders Modifying Subpoenas Issued in Respondent's Behalf in this Proceeding (September 24, 1968).

5/ Id. at p. 3.

6/ Appellants also asserted that the examiner failed to order "in camera treatment for any information introduced" in evidence by respondent. See, e.g., Memorandum in Support of Appeal by Ready-Mix Companies from the Hearing Examiner's Order of September 24, 1968, p. 5 (October 21, 1968). This assertion is obviously premature. There is a possibility that none of the information will be offered into evidence. If respondent does offer any of the information into evidence, appellants will have every opportunity to urge in camera treatment for the information. Until such time, the examiner specifically prohibited respondent's counsel from disclosing any such information to Lehigh, to the trade at large, or to the public.

for the preservation of the requested pretrial discovery information in a manner which respondent finds useful and satisfactory in preparing for cross-examination and for preparation of defense. On the other hand, the order carefully prevents the alleged injuries which might flow from disclosure of the data to Lehigh or to the trade at large by restricting its availability to respondent's counsel alone.

We find that the examiner has carefully attempted to consider the particular facts of this discovery dispute and has tailored a protective order which attempts to fully and fairly balance the potentially conflicting needs of respondent and the third parties. Inasmuch as appellants have failed to present any convincing evidence that the examiner has abused his discretion, we deny the appeals. An appropriate order will be entered.

Commissioner MacIntyre did not participate.

November 22, 1968

[EXHIBIT 9]

[Caption Omitted in Printing]

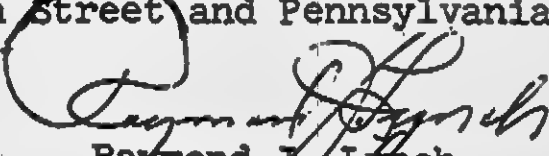
ORDER REINSTATING EXAMINER'S ORDER ISSUED
SEPTEMBER 24, 1968

On September 24, 1968, the undersigned examiner issued an order directing third party cement and ready-mix concrete manufacturers to comply with subpoenas duces tecum as modified by orders issued by Examiner Joseph Kaufman dated May 29, 1968, and June 14, 1968. The examiner's order of September 24, 1968, was stayed by an order of the Commission dated October 14, 1968, while the Commission considered various appeals filed by the third parties. On November 22, 1968, the Commission issued its opinion and order following the interlocutory appeals from the hearing examiner's order and remanded the matter back to the hearing examiner in order that a new effective date be set for compliance with his order of September 24, 1968. Now, therefore,

IT IS HEREBY ORDERED that all third party cement and ready-mix concrete companies subpoenaed and who have failed to comply with the subpoena comply with the examiner's order of September 24, 1968.

IT IS FURTHER ORDERED that all third parties subject to the subpoenas duces tecum referred to above submit the information requested therein either by mailing the same to the respondent's counsel or by submitting the material to respondent's counsel at 10:00 A.M., on January 8, 1969, in Room 7312 of The 1101 Building, 11th Street and Pennsylvania Avenue, N. W., Washington, D. C.

December 5, 1968.


Raymond J. Lynch,
Hearing Examiner.

[EXHIBIT 10]

MOTION REQUESTING CERTIFICATION TO THE COMMISSION
OF REFUSAL OF THIRD-PARTY CEMENT COMPANIES
TO COMPLY WITH SUBPOENAS DUCES TECUM

To the Honorable Raymond J. Lynch, Hearing Examiner:

On January 25, 1968, Hearing Examiner Kaufman issued subpoenas duces tecum to third-party cement manufacturers on respondent's behalf (specifications attached as Exhibit A). Thereafter, the subpoenas were properly served on these third-party cement manufacturers.

Several third-party cement companies then filed motions to quash the subpoenas questioning the relevance of the requested information, and the confidentiality treatment to be accorded it. By order of June 14, 1968 (attached as Exhibit B), the then Hearing Examiner in a lengthy opinion denied these motions to quash, modified certain specifications of the subpoenas, and granted *Mississippi River Fuel* confidentiality treatment to information to be supplied in response to Specifications 1b(3) and 2a-k.

Included among those specifications so protected by the Examiner's Order of June 14 was Specification 2a-k. This specification requested information concerning quasi-merger relationships between portland cement manufacturers and cement purchasers—information which the Examiner ruled respondent was entitled to "so as to have the opportunity to prove its theories" in defense. See Order of June 14, p. 8.

Thereafter, respondent and certain of the third-party cement manufacturers filed cross-interlocutory appeals to the Commission from the Examiner's ruling. On August 1, 1968, the Commission issued an order remanding the matter to the Hearing Examiner to determine whether the *Mississippi River Fuel* protective procedure was appropriate in this instance.

On remand, the present Hearing Examiner declined to accord the requested information *Mississippi River Fuel* treatment, and instead fashioned alternative protective provisions in his order of September 24, 1968 (attached as Exhibit C).

This order was sustained by the Commission in its opinion denying interlocutory appeals from third-party cement manufacturers on November 22, 1968. Subsequently, the Hearing Examiner reinstated the subpoenas, and set January 8, 1969, as the new return date (attached as Exhibit D).

By and following January 8, 1969, respondent has received responses from most of the third-party cement manufacturers. However, four such companies have specifically declined to respond to Specification 2a-k on the ground that the "Commission's action in failing to grant *Mississippi River* treatment to the information called for by this Specification was unlawful, arbitrary, and capricious." See letters from Gerald Kadish, attorney for cement manufacturers, to Ronald J. Wilson, attorney for respondent, January 8, 1969, (attached as Exhibit E).

The four companies which have declined to respond to Specification 2a-k are as follows:

Walter F. Crowther, Vice-President and Secretary, Louisville
Cement Company, 501 South Second Street, Louisville,
Kentucky

William L. Lucas, Secretary and Treasurer, Martin Marietta
Corporation, 227 Park Avenue, New York, New York

H. J. Meredorf, Secretary and Treasurer, General Portland
Cement Company, 111 West Monroe Street, Chicago,
Illinois

Worth Loomis, Vice-President—Administration and Secretary,
Medusa Portland Cement Company, P. O. Box 5668,
Cleveland, Ohio

In addition, one third-party—Gilbert Spencer, Vice President, International Trading Corporation of Florida, P. O. Box 10297, Riviera Beach, Florida—has refused to comply with the subpoenas duces tecum in its entirety (see Tr. 1166).

Since the information requested by Specification 2a-k and this subpoena is necessary and essential to respondent's defensive preparation, respondent has no choice but to seek this information through the Commission's process.

Therefore, respondent requests that the Examiner certify to the Commission the non-compliance of the above-listed companies with the Commission's lawful subpoena duces tecum for enforcement proceedings pursuant to Section 9 of the Federal Trade Commission Act.

Respectfully submitted,

/s/ Frederick M. Rowe

/s/ Ronald J. Wilson

/s/ Richard C. Lowery

of

KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS
800 World Center Building
Washington, D. C. 20006

Attorneys for Respondent

Edward W. Hyland
718 Hamilton Street
Allentown, Pennsylvania

Of Counsel

January 28, 1969

AFFIDAVIT OF SERVICE

District of Columbia

ss

City of Washington

This is to certify that I have caused the attached Motion Requesting Certification To The Commission Of Refusal Of Third-Party Cement Companies To Comply With Subpoenas Duces Tecum to be served by mailing a copy thereof, first class mail, postage prepaid, to the office of counsel, Gerald Kadish, Esq., Howrey, Simon, Baker & Murchison, 1707 H Street, N.W., Washington, D. C. 20006, and to Walter E. Crowther, Vice President and Secretary, Louisville Cement Company, 501 South Second Street, Louisville, Kentucky 40202; Worth Loomis, Vice President—Administration and Secretary, Medusa Portland Cement Company, P. O. Box 5668, Cleveland, Ohio 44010; William L. Lucas, Secretary and Treasurer, Martin Marietta Corporation, 227 Park Avenue, New York, New York 10017; H. J. Meredorf, Secretary and Treasurer, General Portland Cement Company, 111 West Monroe Street, Chicago, Illinois 60603; and to Gilbert Spencer, Vice President, International Trading Corporation, P. O. Box 10297, Riviera Beach, Florida, this 28th day of January, 1969.

/s/ Richard C. Lowery

Subscribed and sworn to before me
this 28th day of January, 1969

/s/ Alice B. Marshall
Notary Public

My Commission Expires: March 31, 1973

LAW OFFICES OF

HOWREY, SIMON, BAKER & MURCHISON

EDWARD F. HOWREY
 WILLIAM SIMON
 DAVID C. MURCHISON
 HAROLD F. BAKER
 J. WALLACE ADAMS
 JOHN D. LOORHUES
 JOHN DOONAN, JR.
 A. DUNCAN WHITAKER
 ROBERT W. STEELE
 J. COLEMAN DEAN
 TERENCE C. SNEEY
 DANIEL A. OPPENHEIM
 MATTHEW R. KENNEY
 GERALD KADISH
 RICHARD T. COLMAN
 PAUL E. MCDONVILLE
 RAY S. SOLZE
 FRANCIS A. O'BRIEN
 JOHN F. BRUCE
 KEITH C. FUGH, JR.
 *NOT A MEMBER OF THE D. C. BAR

1707 H STREET, NORTHWEST
 WASHINGTON, D. C. 20006

TELEPHONE
 AREA CODE 202
 298-6450

B. CHESTERFIELD OPPENHEIM
 OF COUNSEL

January 8, 1969

Ronald J. Wilson, Esquire
 Kirkland, Ellis, Hodson,
 Chaffetz and Masters
 World Center Building
 918 Sixteenth Street, N.W.
 Washington, D. C. 20006

Re: Lehigh Portland Cement Company
FTC Docket No. 8680

Dear Mr. Wilson:

Enclosed is the response of Martin Marietta Corporation to Specifications 1, 3, 4 and 5, as modified, of the subpoena issued in the above matter of January 25, 1968.

Martin Marietta's Dragon Cement Division ships limited quantities of portland cement into the northern counties of Maryland. However, since the amount involved is de minimis we have assumed that it would be unnecessary to include any information with regard to this division.

We are submitting a copy of Martin-Marietta's Annual Report of 1966 in response to Specification 5.

The booklet referred to at the bottom of page one of the Capitol Cement Company response will be submitted to you within the next day or so.

Martin Marietta is not submitting any information responsive to Specification 2 a-k of the subpoena because

HOWREY, SIMON, BAKER & MURCHISON

Ronald J. Wilson, Esq.

- 2 -

January 8, 1969

it believes that the Commission's action in failing to grant Mississippi River treatment to the information called for by this Specification was unlawful, arbitrary and capricious. The Examiner's order, as affirmed by the Commission, fails to adequately protect the legal rights of Martin Marietta with respect to the confidentiality of this irrelevant but highly confidential trade secret information.

Very truly yours,


Gerald KadishGK:mc
Enclosure

[EXHIBIT 11]

[Caption Omitted in Printing]

CERTIFICATION OF RESPONDENT'S MOTIONS REQUESTING
THAT SUBPOENAS DUCES TECUM BE ENFORCED

On December 5, 1968, the undersigned examiner issued an order reinstating an order dated September 24, 1968, directing third-party cement and ready-mix concrete manufacturers to comply with subpoenas duces tecum either by mailing the requested information to respondent's counsel or by submitting the material at 10:00 A.M., on January 8, 1969, in Room 7312 of The 1101 Building, 11th Street and Pennsylvania Avenue, N. W., Washington, D. C.

On January 7, 1969, counsel for the respondent informed the examiner that he had been advised by the third parties or their attorneys that they would comply with the subpoenas as issued, but at a prehearing conference held January 28, 1969, counsel for the respondent informed the examiner that certain of the third parties had failed to comply.

The following listed third-party cement and ready-mix concrete companies have failed to comply with the specifications of the subpoenas:

Walter E. Crowther, Vice President and Secretary,
Louisville Cement Company, 501 South Second
Street, Louisville, Kentucky.

William L. Lucas, Secretary and Treasurer, Martin
Marietta Corporation, 227 Park Avenue,
New York, New York.

H. J. Meredorf, Secretary and Treasurer, General
Portland Cement Company, 111 West Monroe
Street, Chicago, Illinois.

Worth Loomis, Vice President - Administration and
Secretary, Medusa Portland Cement Company,
P. O. Box 5668, Cleveland, Ohio.

Gilbert Spencer, Vice President, International
Trading Corporation of Florida, P. O. Box
10297, Riviera Beach, Florida.

James W. Hunt, Executive Vice-President, Colonial
Supply Co., P. O. Box 1798, Louisville, Kentucky.

James W. Hunt, Executive Vice-President, Concrete
Supply Co., P. O. Box 359, Louisville, Kentucky.

James W. Hunt, Executive Vice-President, American
Concrete Co., Route #3, Broadway Street,
Jeffersonville, Indiana.

James W. Hunt, Executive Vice President, Valley
Concrete Co., Inc., P. O. Box 312, Valley
Station, Kentucky.

W. M. Horn, Partner, Horn & Goin Co., N. Wilkinson
Street, Frankfort, Kentucky.

Robert Atkins, Treasurer, Mattingly Construction Co.,
4511 Illinois Avenue, Louisville, Kentucky.

J. W. Dotson, President, Thompson & Dotson, Inc.,
Route #5, Shelbyville, Kentucky.

William B. Gess, Jr., President, Wings Mixed Concrete
Co., 760 N. Limestone St., Lexington, Kentucky.

Thomas N. Kearns, President, Meekins, Inc., P. O.
Box 3657, West Hollywood, Florida.

Richard M. Pearce, Partner, Suburban Concrete Co.,
4436 Poplar Level Road, Louisville, Kentucky.

Counsel for the respondent has requested by his motions that the examiner certify the matter to the Commission recommending that the Commission take the necessary steps to order the various cement and ready-mix concrete manufacturers to comply with the subpoenas duces tecum. Therefore, the matter is hereby certified to the Commission with the recommendation that appropriate action be taken to compel compliance with the subpoenas.


Raymond J. Lynch,
Hearing Examiner.

February 5, 1969.

[EXHIBIT A]SPECIFICATION 2a-k OF SUBPOENAS DUCES TECUM TO
PORTLAND CEMENT MANUFACTURING FIRMS

(As modified by the hearing examiner's order of June 14, 1968, with respect to respondent as a member of the "Howrey Group".)

DEFINITIONS

"This company" means the company or firm to which the attached subpoena duces tecum is addressed and any subsidiary, affiliate or parent corporation thereof.

"Portland cement" includes Types I-V of portland cement as specified by the American Society of Testing Materials. Neither masonry nor white cement is included.

"Purchaser" means any individual, corporation, partnership or association (but not including divisions, subsidiaries or distribution terminals of this company) which buys portland cement from this company.

"Transferee" means any division, subsidiary or distribution terminal of this company which receives or buys portland cement manufactured by this company.

"Shipment" means net delivery of portland cement by this company to purchasers and transferees, but not including deliveries to manufacturing plants and distribution terminals which are operated by other portland cement manufacturing companies and which are located in the states and locations listed Specification 1a below.

SPECIFICATIONS

* * *

2. Originals or true copies of such books, records and other documents, or a verified summary in lieu thereof,

which will disclose the existence, at any time from January 1, 1963 to date, of any of the following relationships between this company and any cement purchaser located in the six city areas named and defined in the complaint, to wit, Washington, Louisville, Lexington, Jacksonville, Orlando and Miami, and the details of each such relationship:

- a. Any secured or unsecured debt in excess of \$10,000 (other than any debt incurred in the purchase of cement and paid within ninety (90) days of the shipment of the cement with respect to which said debt was incurred), whether or not due, outstanding to this company by a cement purchaser.
- b. Any debt of a cement purchaser guaranteed in whole or in part by this company.
- c. Any lease, whether oral or in writing, between this company and a cement purchaser regarding any assets used by such cement purchaser in the production or distribution of ready-mixed concrete, or used by this company.
- d. Any lease-purchase agreement, real estate transaction, and any other arrangement between this company and a cement purchaser regarding any assets used by such cement purchaser in the production or distribution of ready-mixed concrete, or used by this company.
- e. Any right or option, conditional or unconditional, of this company to acquire at any time, directly

or indirectly, any part of the stock or assets owned or used by a cement purchaser.

- f. Any sale or sales of equipment or other property (other than portland cement) by this company to a cement purchaser, or the guarantee by this company of credit for any purchase or purchases of equipment or property by a cement purchaser.
 - g. Any purchase or purchases by this company of equipment or property from a cement purchaser, or the guarantee by a cement purchaser of credit for any purchase or purchases of equipment or property by this company.
 - h. The furnishing by this company, by construction or otherwise, of equipment or other property, directly or indirectly, for or on behalf of a cement purchaser without charge or for a consideration less than the fair value of the equipment or property furnished.
 - i. Any contribution to capital by or on behalf of this company to or on behalf of a cement purchaser.
 - j. The placing or retaining on the payrolls of this company of any officers or employees of a cement purchaser; and
 - k. The presence of one or more of the members of the Board of Directors or employees of this company on the Board of Directors or members of management of a cement purchaser.
-

[EXHIBIT B]

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Philip Elman
Everette MacIntyre
John R. Reilly
Mary Gardiner Jones

In the Matter of
MISSISSIPPI RIVER FUEL CORPORATION,
a corporation.

DOCKET NO. 8657

ORDER ENTERTAINING AND
DENYING APPEALS FROM
HEARING EXAMINER'S DENIAL
OF MOTIONS TO QUASH OR
LIMIT SUBPOENAS

In January 1965, the Commission issued the complaint in this case charging that respondent's acquisitions of ready-mix concrete firms in Kansas City, Missouri, Memphis, Tennessee, and Cincinnati, Ohio, during the period from September 1963 through January 1964, violated Section 7 of the amended Clayton Act. On the application of respondent's counsel, the hearing examiner on January 27, 1966, entered an order for the taking of depositions and the issuance of subpoenas duces tecum to 33 portland cement manufacturers and 36 ready-mix concrete distributors and their officials, many of whom have moved to quash or limit these subpoenas. On April 12, 1966, the hearing examiner heard oral argument and conducted a conference on the motions to quash or limit the subpoenas. Thereafter, on April 28, 1966, the hearing examiner issued an order denying the motions to quash but modifying and limiting the subpoenas in some respects. The matter is now before the Commission on the appeal from the hearing examiner's order of a number of those persons subpoenaed.

Section 3.17 of the Commission's Rules of Practice provides that an appeal to the Commission from the hearing examiner's ruling granting or denying a motion to limit or quash any subpoena "will be entertained by the Commission only upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing will better serve the interests of justice". The Commission has determined that the requisite showing has been made in this case and it therefore entertains the appeals.

Complaint counsel and respondent's counsel have stipulated, for the purposes of this proceeding only, that if a cement consumer had or has one or more of the relationships described below with a portland cement manufacturer, then during the existence of that relationship, the cement consumer is likely to be influenced to buy a significant part of its cement requirements from such manufacturer:

(1) any debt due of a cement consumer to a manufacturer which has been owing for more than 60 days;

(2) debts of a cement consumer guaranteed by a cement manufacturer;

(3) any lease between a cement manufacturer and a cement consumer for assets used by the consumer in the production or distribution of ready-mixed concrete or concrete products;

(4) any lease-purchase agreement between a cement manufacturer and a cement consumer for assets used by the consumer in the production or distribution of ready-mixed concrete or concrete products;

(5) any right or option of a cement manufacturer to acquire any of the stock or assets of a cement consumer;

(6) any sale of equipment or other property where the deferred purchase price is secured by lien or retention of title by a cement manufacturer to a cement producer;

(7) the furnishing of equipment or other property by a cement manufacturer to a cement consumer without charge or for a consideration less than the fair value of the property;

(8) any contribution of capital by a cement manufacturer to a cement consumer;

(9) the placing or retaining on the payroll of a cement manufacturer of any officer or employee of a cement consumer; and

(10) the presence on the Board of Directors of a cement consumer of one or more directors common to a cement manufacturer.

The subpoenas at issue here seek documents and writings which reflect any of these relationships */ for the years 1963 through 1965 and, as modified by the hearing examiner, the geographic area covered is that defined in the complaint.

*/ The hearing examiner's order modified the subpoenas to require data as to debts owing for more than 90 days rather than the 60 days stipulated.

The hearing examiner's order provided that the subpoenas may be complied with by mailing the specified papers to respondent's counsel in lieu of personally appearing and testifying. The order contains further provisions with reference to the copying of documents and disclosure of their contents, all designed to protect the confidentiality of the information submitted in response to the subpoenas.

Appellants launch a broadly based attack on the validity of the subpoenas. They argue first that the subpoenas constitute an effort on the part of respondent to engage in a discovery proceeding unauthorized by the Commission's Rules. We disagree. By the subpoenas, respondent proposes to gather evidence by which it expects to prove certain aspects of the structure of the cement and ready-mix markets in the relevant geographical areas. The subpoenas cover a limited and specified class of documents relating to specifically defined relationships--relationships which constitute elements of the economic setting in which the challenged mergers took place. On this basis, we reject appellants' contention that "respondent's purpose is not to obtain evidence but to conduct an expedition in the hope of discovering something helpful."

Although it is not necessary to decide now, and we do not decide, whether the type of evidence that respondent seeks to elicit by the subpoenas will constitute a defense to the Section 7 violations charged in this case, it does appear that the material sought is relevant to an appraisal of market conditions in the cement industry and pertinent to the issues in this case. Respondent is entitled to gather such information for purposes of making its defense. It is clear that the information sought would not be given voluntarily and that it is available to respondent only through compulsory process. If respondent is denied the opportunity to collect this material, it will be unable to lay the foundation for whatever legal arguments, based on market conditions, it may wish to make. It is to be emphasized that the Commission does not imply its acceptance or rejection of any legal argument that respondent may choose to make in its defense. We merely hold that respondent is not to be foreclosed, at this stage of the proceeding, from attempting to make its defense by being denied the opportunity to obtain the necessary evidence. We also reject appellants' contentions that some items of the subpoenas are not relevant.

Appellants contend also that respondent's real purpose is to gather highly confidential competitive data which will be "of incalculable value to respondent in competing with movants". The Commission believes that the data sought is not of so confidential or sensitive a nature as appellants claim and, moreover, that the protective provisions of the examiner's order render it highly unlikely that the material submitted by appellants can be put to unfair or improper competitive use by respondent. However, out of an abundance

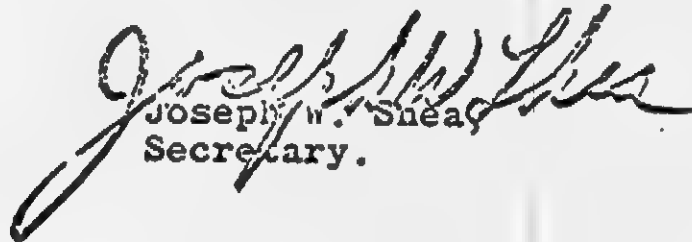
of caution and in order to avoid any possibility that the allegedly confidential data will be improperly used, we direct that material submitted in response to the subpoenas should be submitted to a reputable and disinterested accounting firm, to be selected by the hearing examiner in consultation with the parties, which shall compile and present the material to respondent's counsel in such manner that no individual company's confidential arrangements or data will be revealed. This shall be in addition to the protective provisions already contained in the examiner's order. The request for oral argument is denied.

IT IS SO ORDERED.

By direction of the Commission, Commissioner MacIntyre not participating.

S E A L

ISSUED: June 8, 1966


Joseph W. Shear
Secretary.

[EXHIBIT C]

[Caption Omitted in Printing]

ORDER DENYING PETITION
FOR RECONSIDERATION

Respondent, Mississippi River Fuel Corporation, has filed a Petition for Reconsideration of the Commission's Order Entertaining and Denying Appeals from Hearing Examiner's Denial of Motions to Quash or Limit Subpoenas, issued June 8, 1966. Respondent requests that the Commission rescind its direction, contained in that order, that material produced in response to the subpoenas issued herein be submitted to an accounting firm which shall compile and present the material to respondent's counsel in such manner that no individual company's confidential arrangements or data will be revealed.

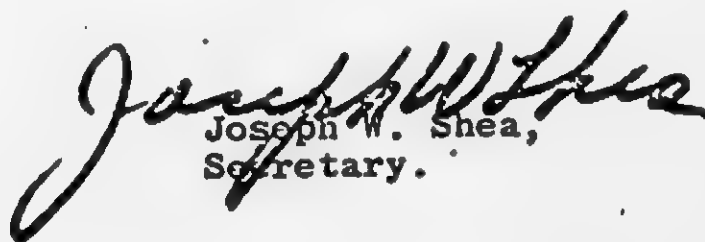
Respondent argues that this requirement will prevent it from developing all the facts relating to the state of competition in the market because the accounting firm will not know whether the replies to the subpoenas "are responsive or not, or whether they are accurate or complete" and "will convert the evidence sought by Respondent into simple, untested, expository statements of whatever the witnesses desire to submit." Respondent's contentions at this stage in the proceeding must remain in the area of hypothesis and conjecture. We do not agree with respondent's contentions and adhere to our decision.

The interposition of an accounting firm between respondent and the subpoenaed parties in no way limits or impairs respondent's ability to develop whatever facts it can from the material produced in response to the subpoenas. Respondent argues that a disinterested accounting firm "would have absolutely no conception of or interest in the issues in this case." Of course, "disinterested", as used in the Commission's order, connoted the absence of an interest in the outcome of this proceeding. The hearing examiner, after consultation with complaint counsel and respondent's counsel, will provide the accounting firm with sufficient information to enable it to perform its function. Nor is there any reason to believe that responses to the subpoenas will be less complete or less candid because the responses are directed to an accounting firm rather than to respondent's counsel. Because of the overlapping nature of the subpoenas, the accounting firm will be as capable as respondent's counsel of detecting incomplete responses. In essence, respondent is seeking the right to rummage at will through the confidential business files of the subpoenaed firms, many of which are now, or may be in the future, its competitors. This it is not entitled to do. In order to avoid any possibility that the data claimed to be confidential will be improperly used, it is necessary that material submitted in response to the subpoenas be presented to respondent's counsel in such manner that no individual company's confidential arrangements will be revealed.

IT IS ORDERED that respondent's Petition for Reconsideration be, and it hereby is, denied.

By the Commission, Commissioner MacIntyre not participating.

S E A L


Joseph W. Shea,
Secretary.

ISSUED: July 15, 1966

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

FILED

OCT 7 1969

ROBERT M. STEARNS, Clerk

Civil Action
No. 2804-69

RECEIVED

OCT 8 11 46 AM '69

U. S. MARSHAL

FEDERAL TRADE COMMISSION,
6th Street & Pennsylvania Avenue, N.W.,
Washington, D.C. 20580,

Petitioner,

v.

WALTER E. CROWTHER, Vice-President
and Secretary,
LOUISVILLE CEMENT COMPANY,
501 South Second Street,
Louisville, Kentucky,

Respondent.

ORDER TO SHOW CAUSE

Pursuant to the authority granted by Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, the Federal Trade Commission, having invoked the aid of this Court in requiring testimony and the production of books, records, and documents by Walter E. Crowther, Vice-President and Secretary, Louisville Cement Company, pursuant to a subpoena duces tecum issued in the course of an adjudicative proceeding before the Commission styled In the Matter of Lehigh Portland Cement Company, Docket No. 8680, and the Court having considered the Petition of the Commission, it is hereby

ORDERED that notice is given to Walter E. Crowther, Vice-President and Secretary, Louisville Cement Company, to appear on the 20th day of November 1969, at 10:00 A.m. in Motions Court, United States Court House, Third and

Constitution Avenue, N.W., Washington, D.C., provided service is made on or before the ^{31st} day of OCTOBER, 1969, and show cause, if any there be, why this Court should not grant said Petition and enter an order directing the giving of testimony and the production of books, records, and documents, as required by said subpoena.

IT IS FURTHER ORDERED that a certified copy of this order, and copies of said Petition and the memorandum in support thereof, filed herein, be served forthwith upon respondent by the United States Marshall, in the manner provided in the Federal Rules of Civil Procedure for the service of summons.

IT IS FURTHER ORDERED that if respondent intends to file a paper in opposition to said Petition or to the entry of the order requested therein, such paper must be filed and served no later than five days prior to the date on which respondent is to appear.


UNITED STATES DISTRICT JUDGE

Dated: OCTOBER 7 - 1969

A TRUE COPY
OCT 8 1969
ROBERT M. STEARNS, Clerk

By 
Deputy Clerk

[Caption Omitted in Printing]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the Court on petition of the Federal Trade Commission for an order requiring respondents to produce documents in accordance with a subpoena duces tecum issued by the Commission in the course of an adjudicative proceeding before the Commission, and the Court having considered the petition, its attachments, and the memoranda in support and in opposition filed herein, and having heard oral argument in open court, it hereby finds the facts and states the conclusions of law as follows:

Findings of Fact

1. The Federal Trade Commission, petitioner herein, is presently conducting an inquiry in the City of Washington, District of Columbia, upon an amended complaint charging that Lehigh Portland Cement Company ("Lehigh") has made a number of acquisitions in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

2. In the course of that proceeding, a duly appointed hearing examiner of the Commission issued at the instance of Lehigh and caused to be served upon respondents subpoenas duces tecum containing identical specifications.

3. Respondents appeared in the administrative proceeding and initially raised several objections to the subpoenas. The issues, however, were eventually narrowed to the question of the confidential treatment to be given to the information requested by Specification 2a-k, and respondents complied with the remaining specifications.

4. With respect to Specification 2a-k, respondents' position, as stated in a stipulation between respondents and Lehigh, was that the information requested was confidential and that they will not submit any response to Specification 2a-k unless such response shall be submitted to an independent accounting firm to be selected in accordance with the procedures utilized in, and that the data be treated in the same confidential manner as in Mississippi River Fuel Corp.,
1/
Docket 8657.

5. Counsel for Lehigh opposed the Mississippi River method of protective treatment but did stipulate that they would protect the confidentiality of the data in the following manner:

1/ Under the method utilized in Mississippi River, the independent accountant would compile and present the material to Lehigh's counsel in such a manner that no individual company's confidential arrangements or data will be revealed. Mississippi River Fuel Corporation, Docket No. 8657 (FTC order of June 8 and July 15, 1966)

It is . . . stipulated by counsel for respondent, Lehigh Portland Cement Company, and by counsel for deponents that unless and until offered in evidence as exhibits in the above-captioned proceeding, and subject to further order by the Hearing Examiner, all documents, correspondence, data and verified summaries submitted by deponents to counsel for respondent in said proceeding in response to the subpoena duces tecum issued by the Hearing Examiner on January 25, 1968, will be kept strictly confidential, for use only by independent legal counsel for respondent, Lehigh Portland Cement Company, or by counsel's technical experts not regularly employed by respondent Lehigh, as counsel for respondent may deem necessary in connection with their preparation of this adjudicative proceeding. Provided, however, that any documents designated as trial exhibits by counsel for respondent may be disclosed to counsel for the Federal Trade Commission pursuant to pre-trial procedures in this case. Counsel for respondent will request the Hearing Examiner to order FTC counsel also to treat such information on a confidential basis.

Counsel for respondent further agrees not to oppose any appropriate request or motion by deponents to the Hearing Examiner, in connection with any offer in evidence of such materials, protecting against public disclosure of any materials submitted by deponents in response to the above-referenced subpoena duces tecum.

6. The hearing examiner, upon consideration of the stipulation of the parties and of the memoranda filed in support of their position by respondents and the opposing memoranda of Lehigh, on June 14, 1968, entered an order providing that the manner of production of the information requested by Paragraph 2a-k of the subpoena, as modified

in his order, shall be pursuant to the confidentiality procedure of the Mississippi River case. He stated in said order that it was his opinion that the Mississippi method of insuring confidentiality does impair quite substantially the usefulness of the information to the party requesting the information and that this is particularly so in respect to Lehigh's right to general discovery, i.e., for cross-examination and general purposes. However, it was his feeling that he must act in full deference to the Mississippi doctrine of confidentiality and to the policy statements in that connection announced by the Commission in its orders of June 8, 1966 and July 15, 1966, in that case.

7. Lehigh appealed the examiner's order to the Commission. On August 2, 1968, the Commission remanded the case to a new hearing examiner for further consideration. ^{2/} In

ving its reasons for the remand, the Commission said:

We believe that the examiner has incorrectly interpreted our decisions in the Mississippi River case. The Commission in that case neither stated nor implied that henceforth such treatment was to be mandatory. We merely held that under the facts of that proceeding the treatment ordered was appropriate. The Commission was, and is, loath to substitute its judgment for the examiner's judgment

^{2/} A new hearing examiner was designated because of the possibility that the examiner's impending mandatory retirement might have occurred prior to the completion of the adjudicative proceeding.

on such matters. This requires, however, that the examiner must actively and independently evaluate all of the countervailing factors in reaching his decision. The examiner, because of his proximity to the case, is, in the first instance, in a far better position to assess the multitude of variables inherent in the delicate balancing of interests between the respondent's need to know sensitive information and the third party's need to protect the same valuable information from his competitor. It is indeed conceivable that, depending on the particular facts, similar specifications may require dissimilar treatment in order to insure the most equitable resolution of these conflicting interests. Because of the examiner's misconstruction of the Mississippi River opinions, we are not convinced that such evaluation has been given to this matter.

8. On remand, the new hearing examiner, on September 24, 1968, issued an order in which he ruled that the data should be submitted without Mississippi River treatment but in accordance with the protective measures set forth in his order. In his order, the examiner first noted the prior proceedings that had taken place, including the issuance of the subpoenas, the motions to quash, the examiner's order of June 14, 1968, the appeal filed by Lehigh from that order, the answers filed by third parties defending the examiner's ruling and the Commission's order of August 1, 1968. He then concluded as follows:

The undersigned examiner has carefully reviewed all of the documents above referred to and is of the opinion that the orders issued by Examiner Kaufman dated May 29, 1968, and June 14, 1968, directing compliance with the subpoenas as modified must be complied with and that all of the information requested by the respondent be

submitted without Mississippi River treatment. Counsel for respondent has made it abundantly clear that he will not disclose the information supplied. 3/ Now, therefore,

IT IS HEREBY ORDERED that to assure that counsel for Lehigh Portland Cement Company will not use the data subpoenaed for an improper competitive purpose, the documents and information furnished by third parties to the attorney for Lehigh in response to the subpoenas as modified by Examiner Kaufman's orders dated May 29, 1968, and June 14, 1968, shall not be disclosed to Lehigh personnel.

IT IS FURTHER ORDERED that the data and documents produced by third parties pursuant to the subpoenas shall be disclosed or made available by respondent's counsel to counsel supporting the complaint only to the extent that the information is to be used in respondent's defense.

IT IS FURTHER ORDERED that no copies shall be made of any said materials, except those to be used as exhibits in the hearing in the above matter and copies may be made and used only for such purpose; That said materials furnished by third parties and any copies made of aforesaid (except copies or originals which may become a part of the official record in this matter), shall be returned to third parties promptly following the close of the hearings in the above matter.

IT IS FURTHER ORDERED that, until further order of this examiner, the information furnished by third parties under the subpoenas is not to be made public.

3/ The examiner's footnote: U.S. vs Lever Brothers Company and Monsanto Chemical Company, Civil Action No. 135-219, Protective Order issued April 14, 1961. F.T.C. vs Lone Star Cement Corporation, D. 8585, Protective Order for third party Atlantic Cement Company, Inc., issued October 28, 1964.

9. Respondents appealed the examiner's order to the Commission. On November 22, 1968, the Commission issued its order denying the appeal. The Commission stated as its reasons for denying the appeal:

This Commission can appreciate the serious consequences of unwarranted disclosure of sensitive business information. However, it seems clear to us that the examiner has carefully considered our previous opinion . . . remanding the prior appeals on the identical issues. The examiner's order indicates a thoughtful and workable balancing of the conflicting interests inherent in any such situation. On the one hand, the September 24, 1968, order has provided for the preservation of the requested pretrial discovery information in a manner which respondent finds useful and satisfactory in preparing for cross-examination and for preparation of defense. On the other hand, the order carefully prevents the alleged injuries which might flow from disclosure of the data to Lehigh or to the trade at large by restricting its availability to respondent's counsel alone.

10. Subsequent to the ruling of the Commission, respondents still refused to produce the information called for by Paragraph 2a-k of the subpoenas on the specified return date. Lehigh accordingly filed a motion with the examiner requesting that he certify to the Commission the refusal of respondents to comply with the subpoenas duces tecum. In the motion Lehigh stated that the information requested by Specification 2a-k is necessary and essential to Lehigh's defensive preparations. Said motion was certified by the examiner to the Commission with the recommendation that

appropriate action be taken to compel compliance with the subpoenas.

11. On October 3, 1969, the Federal Trade Commission, with the consent of the Attorney General of the United States, filed petitions in this Court for enforcement of the Commission subpoenas served upon respondents.^{4/}

Conclusions of Law

1. Jurisdiction of this cause and of respondent, and power to issue the order hereafter prayed for, are conferred upon this Court by Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, which provides that any District Court of the United States "within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question * * *." The inquiry, in the course of which petitioner's subpoena was issued and served, is being

^{4/} After the petition in Civil Action No. 2806-69 was filed, petitioner moved to amend the petition so as to substitute General Portland Cement Company as a respondent in place of H. J. Meredorf, Secretary and Treasurer of the Company. This motion was granted by order of the Court dated October 28, 1969, and the amendment was filed.

conducted by petitioner within the jurisdiction of this Court.

2. The subpoenas meet the standards required for judicial enforcement. They are within the authority of the Commission, their specifications are reasonable in scope and sufficiently definite, and the information requested is reasonably relevant to the Commission's proceeding. See Oklahoma Press Publishing Company v. Walling, 327 U.S. 176, 208-09 (1946); Civil Aeronautics Board v. Hermann, 353 U.S. 322 (1957).

3. The type of protective order to be entered against disclosure or misuse of confidential information submitted in response to the subpoenas rests within the sound discretion of the Commission, and its decision will not be overturned except on a showing that the Commission has abused its discretion. Federal Communications Commission v. Schreiber, 381 U.S. 279, 290-292 (1965).

4. The Commission, by its approval of a particular method of confidential treatment in Mississippi River Fuel Corporation, No. 8657 (FTC Orders of June 8 and July 15, 1966) is not precluded thereby from permitting other methods of confidential treatment in other cases, so long as the confidential treatment adopted is fair. See Federal Communications Commission v. WOKO, 329 U.S. 223, 227-228 (1946).

5. There has been no abuse of discretion in the Commission's approval of the confidential treatment granted by the examiner in his order of September 24, 1968, to the information required to be produced by the subpoena, including the information required to be produced by Specification 2a-k. Both the examiner and the Commission have sufficiently articulated their reasons for adopting the confidential treatment and the Commission's determination that the examiner's order of September 24, 1968, is a fair balancing of the potentially conflicting needs of Lehigh (the party requesting the data) and respondents' is a reasonable one. ^{5/}

6. The subpoenas in question having been issued and served in accordance with law, the relief prayed for by the petitions should be granted.

Dated:

United States District Judge

Presented by:

GERALD HARWOOD

Attorney

Federal Trade Commission

NATHAN DODELL

Assistant United States Attorney

^{5/}

The hearing examiner's decision, approved by the Commission, recognizes the need for Lehigh counsel to use the information and the need to assure that the data will not be used for an "improper competitive purpose." The hearing examiner accommodated these needs by the prohibition against disclosure to Lehigh personnel and the assurance of Lehigh's independent counsel that they will not disclose the information.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REC'D NOV 28 1966

FEDERAL TRADE COMMISSION,

Petitioner,

v.

WALTER E. CROWTHER,
Vice President and Secretary,
Louisville Cement Company,

WILLIAM L. LUCAS,
Secretary and Treasurer,
Martin Marietta Corporation,

GENERAL PORTLAND CEMENT COMPANY,

WORTH LOOMIS,
Vice President - Administration
and Secretary,
Medusa Portland Cement Company,

Respondents.

Civil Action

Nos. 2804-69

2805-69

2806-69

2807-69

ORDER

This matter having come before the Court on petition of the Federal Trade Commission for an order requiring respondents to produce documents in accordance with a subpoena duces tecum issued by the Commission in the course of an adjudicative proceeding before the Commission, and the Court having considered the petition, its attachments, and the memoranda in support and in opposition filed herein,

and having heard oral argument in open court on November 20, 1969, and the Court being of the opinion that the relief sought by the petition should be granted, it is hereby

ORDERED that respondent Walter E. Crowther, Vice President and Secretary, Louisville Cement Company, be, and he hereby is, commanded to appear before such hearing examiner of the Federal Trade Commission as it may duly designate, at the Commission's offices at 414 - 11th Street, N. W., Washington, D. C., at a time and on a date to be set by the Commission upon not less than five days' notice and then and there to testify and produce documentary evidence in accordance with a Federal Trade Commission subpoena dated January 25, 1968, heretofore served upon the said respondent, as modified by the examiner's order dated June 14, 1968, and subject to the protective order of the examiner dated September 24, 1968, and it is further

ORDERED that respondent William L. Lucas, Secretary and Treasurer, Martin Marietta Corporation, be, and he hereby is, commanded to appear before such hearing examiner of the Federal Trade Commission as it may duly designate, at the Commission's offices at 414 - 11th Street, N. W., Washington, D. C., at a time and on a date to be set by the Commission upon not less than five days' notice and then and there to testify and produce documentary evidence

in accordance with a Federal Trade Commission subpoena dated January 25, 1968, heretofore served upon the said respondent, as modified by the examiner's order dated June 14, 1968, and subject to the protective order of the examiner dated September 24, 1968, and it is further

ORDERED that respondent General Portland Cement Company be, and it hereby is, commanded to appear before such hearing examiner of the Federal Trade Commission as it may duly designate at the Commission's offices at 414 - 11th Street, N. W., Washington, D. C., at a time and on a date to be set by the Commission upon not less than five days' notice and then and there to testify and produce documentary evidence in accordance with a Federal Trade Commission subpoena dated January 25, 1968, heretofore served upon the said respondent, as modified by the examiner's order dated June 14, 1968, and subject to the protective order of the examiner dated September 24, 1968, and it is further

ORDERED that respondent Worth Loomis, Vice President - Administration and Secretary, Medusa Portland Cement Company, be, and he hereby is, commanded to appear before such hearing examiner of the Federal Trade Commission as it may duly designate at the Commission's offices at 414 - 11th Street, N. W., Washington, D. C., at a time and on a date to be set by the Commission upon not less than five days' notice and

then and there to testify and produce documentary evidence in accordance with a Federal Trade Commission subpoena dated January 25, 1968, heretofore served upon the said respondent, as modified by the examiner's order dated June 14, 1968, and subject to the protective order of the examiner dated September 24, 1968, and it is further

ORDERED that a certified copy of this order be served upon respondents by the United States Marshal in the manner provided by the Federal Rules of Civil Procedure for service of summons.

United States District Judge

[Caption Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that Walter E. Crowther, Vice President and Secretary, Louisville Cement Company; William L. Lucas, Secretary and Treasurer, Martin Marietta Corporation; General Portland Cement Company; and Worth Loomis, Vice President-Administration and Secretary, Medusa Portland Cement Company, respondents above named, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the order requiring respondents to testify and

produce documentary evidence in a Federal Trade Commission proceeding entered in this action on the first day of December 1969.

HAROLD F. BAKER
J. WALLACE ADAIR
GERALD KADISH
HOWREY, SIMON, BAKER & MURCHISON
1707 H Street, Northwest
Washington, D.C. 20006

Attorneys for Respondents

Dated: December , 1969

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REC'D JAN 1 1970

FEDERAL TRADE COMMISSION,

Petitioner,

v.

WALTER E. CROWTHER,
Vice President and Secretary,
Louisville Cement Company, ET AL.,
a consolidated action,

Respondents.

Civil Action

Nos. 2804-69

2805-69

2806-69

2807-69

ORDER

Upon consideration of respondents' motion to stay final order entered December 1, 1969, pending appeal, the memorandum of points and authorities in support thereof, and the

opposition thereto, and counsel having been heard in open court, and the Court having entered an oral opinion herein, it is hereby

ORDERED that respondents' motion be and is hereby denied.

United States District Judge

Dated: _____

[Bench Opinion]

[pp. 25-27]

THE COURT: Both sides have quoted the same cases as the criteria for the Court to consider in the exercise of its discretion as to whether a stay should be granted. They each argue those criteria in a different aspect, as is to be expected, but it does appear to this Court that the Commission did not abuse its discretion in issuing its order since it did consider the matter fully and it did enter a protective order.

The mere fact that the protective order differed from the protective order that had been entered in another case, in the opinion of this Court does not render the present action an abuse of the discretion of the Commission.

Inasmuch as there is a protective Order, the Court feels that there would not be irreparable harm to damage to

the respondents in this case, and the mere fact that the question might become moot if a stay is not granted, in the opinion of the Court is not a sufficient reason for granting a stay.

The Supreme Court in the case of Virginia Railway Company against United States of America, 272, United States Reports, 658 says on page 673, in talking about an Interstate Commerce Commission case:

"It must appear either that the District Court entertains a serious doubt as to the correctness of its own decision"

and I have also addressed myself to that aspect of it --

"-- or that the decision depends upon a question of law in which there is conflict among the courts of several circuits"--

and I do not think there has been any showing to this Court that the circuits have interpreted the issue that is involved here in varying manners.

"-- or that some other special reason exists why the order of the Commission should not become operative until its validity can be considered by the Court."

It is in that particular area that it appears to me that this Court would have to make its determination and, in considering the matter, the Court finds that it has been unable to determine from the facts in this case any special reason wherein this case should be made the subject of a stay pending appeal.

Of course, the Court of Appeals may differ with me and grant that stay itself, but on the basis of what is before me, the Court will deny the motion to stay.





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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23924-27

FEDERAL TRADE COMMISSION,

Petitioner-Appellee,

v.

WALTER E. CROWTHER,
Vice President and Secretary, Louisville
Cement Company,

WILLIAM L. LUCAS, Secretary and Treasurer,
Martin Marietta Corporation,

GENERAL PORTLAND CEMENT COMPANY,

WORTH LOOMIS, Vice President-
Administration and Secretary, Medusa Portland
Cement Company,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

COUNTERSTATEMENT OF THE ISSUE PRESENTED*

Whether the court below properly ruled that there had been no showing of any abuse of discretion by the Federal Trade Commission in selecting the particular method of protective or confidential treatment of subpoenaed information employed here.

* This case has not previously been before this Court.

COUNTERSTATEMENT OF THE CASE

On October 3, 1969, the Government petitioned the United States District Court for the District of Columbia to enforce subpoenas duces tecum issued by the Federal Trade Commission against officers of four corporations (hereafter "respondents"),^{1/} at the instance of Lehigh Portland Cement Company, to assist the latter in defending an adjudicatory proceeding brought against it by the Commission (App. 2-86).^{2/} After consolidating the several proceedings, the district court, on December 1, 1969, ordered respondents to comply with the subpoenas (App. 97-110). Thereafter, on January 22, 1970, the district court denied respondents' motion for a stay pending appeal (App. 111-114).

The factual and statutory background of these consolidated appeals are set forth below.^{3/}

1. The Federal Trade Commission has commenced an adjudicatory proceeding challenging the legality, under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act,

^{1/} One of the corporations, General Portland Cement Company, has been substituted as a respondent in place of its officer, Mr. Meredorf, who was originally named as a respondent.

^{2/} "App." refers to the Appendix to the Briefs.

^{3/} On February 9, 1970, this Court consolidated respondents' appeals from the district court's December 1, 1969 enforcement order.

15 U.S.C. 18, of acquisitions by Lehigh Portland Cement Company ("Lehigh"), a cement manufacturer, of certain ready-mixed concrete firms (App. 10-20). On January 25, 1968, the hearing examiner, during the course of pretrial conferences in the adjudicatory proceeding, issued, at Lehigh's instance, identical subpoenas duces tecum against corporate officers of a number of other cement manufacturers (App. 21-29).

In February 1968, four of the subpoenaed parties, the respondents herein, moved to quash the subpoenas (see App. 5,29)^{4/}. In May 1968, respondents entered into a stipulation with Lehigh, narrowing in certain respects the specifications of the subpoenas (App. 29-36). Lehigh also stated, in the stipulation, its agreement that certain subpoenaed information would be used only in connection with Lehigh's defense of the adjudicatory proceeding, and that this information "will be kept strictly confidential for use only by independent legal counsel" for Lehigh,^{5/} or by Lehigh's "technical experts not regularly employed" by it (App. 35). Lehigh also stipulated that it would request the hearing examiner to allow the Commission's complaint counsel to have access to the confidential information only if such counsel also treated it "on a confidential basis" (App. 35-36). Further, Lehigh stipulated that, should any of the confidential information be offered in evidence at the hearing, Lehigh would not oppose an appropriate request by respondents

^{4/}A number of other subpoenaed parties also moved to quash the subpoenas, but they have all complied with the specifications of the subpoenas (2a-2k) at issue on this appeal (see App. 81).

^{5/} The adjudicatory proceeding against Lehigh is being defended by independent legal counsel (App. 38, 106).

for an order "protecting against public disclosure" of such information (App. 36). However, respondents insisted that the confidential information should be made available only to "an independent accounting firm" for compilation in such a way that the identity of the reporting companies would not be revealed -- in accordance with a method of confidential treatment employed by the Commission in another case, decided almost two years earlier, Mississippi River Fuel Corp., Dkt. No. 8657 (App. 34-35)^{6/}.

Subsequently, respondents complied with all specifications of the subpoenas, except specifications 2a-2k, as to which respondents continued to demand the method of confidential treatment employed by the Commission in Mississippi River, supra (see App. 87-89, 98).^{7/} On June 14, 1968, the hearing examiner issued an order in which he recognized that Lehigh was seeking "rather sensitive information from its own competitors, or potential competitors, who as such have been allegedly damaged by [Lehigh's] * * * acquisitions of ready-mix concerns purchasing cement" (App. 40). On the other hand, the hearing examiner also recognized that the method of confidential treatment employed in Mississippi River, supra, "does impair quite substantially the usefulness of the information" to Lehigh, particularly with respect to cross-examination,

^{6/} The Commission's orders in Mississippi River, dated June 8, 1966, and July 15, 1966, are reprinted at App. 90-94.

^{7/} Specifications 2a-2k request information concerning the financial and contractual relationships between the respondent companies and cement purchasers (App. 87-89).

and Lehigh's right to general pre-trial discovery, a right which was provided by the 1967 Amendments to the Commission's Rules of Practice for Adjudicative Proceedings (Rule 3.34(b)(2))(App. 40). However, since specifications 2a-2k represented "the very same group of Specifications passed on by the Commission" in the Mississippi River case, the hearing examiner ruled that, as to those specifications, disclosure would be conditioned upon the Mississippi River method of confidential treatment -- viz., the information would be made available only to an independent accounting firm for compilation in such a way that the identity of the reporting companies would not be revealed (App. 41,53). As to other specifications of the subpoenas, for which respondents also claimed confidentiality, the hearing examiner ruled that the method of confidential treatment stipulated to by Lehigh is "generally quite adequate" (App. 41)^{8/}. The hearing examiner noted that he did "not go along with any lack of confidence in [Lehigh's] * * * confidentiality agreements * * *" (App. 55).

Lehigh appealed the hearing examiner's June 14, 1968 order to the Commission, contending that the Mississippi River confidentiality method impaired Lehigh's right "to prepare adequately for cross-examination" and needlessly prejudiced Lehigh's ability

^{8/} As noted above (p. 4), respondents have in fact supplied such additional information pursuant to this mode of confidential treatment

"to conduct an effective defense, especially when sufficient protection can be afforded by other, less prejudicial means" (see App. 69). In ruling on this objection, the Commission stated, in an opinion dated August 1, 1968, that the hearing examiner had incorrectly interpreted its decision in Mississippi River (App. 70-71):

* * * The Commission in that case neither stated nor implied that henceforth such treatment was to be mandatory. We merely held that under the facts of that proceeding the treatment ordered was appropriate. The Commission was, and is, loath to substitute its judgment for the examiner's judgment on such matters. This requires, however, that the examiner must actively and independently evaluate all of the countervailing factors in reaching his decision. The examiner, because of his proximity to the case, is, in the first instance, in a far better position to assess the multitude of variables inherent in the delicate balancing of interests between the respondent's need to know sensitive information and the third party's need to protect the same valuable information from his competitor. It is indeed conceivable that, depending on the particular facts, similar specifications may require dissimilar treatment in order to insure the most equitable resolution of these conflicting interests. Because of the examiner's misconstruction of the Mississippi River opinions, we are not convinced that such evaluation has been given to this matter.

Neither the Commission nor the courts have given recognition to an absolute trade secret privilege. The revelation of a trade secret will be compelled if it is indispensable to the proceeding. Nevertheless, the Commission and the courts have hesitated to order disclosure absent a clear showing of immediate need for the requested information. Once disclosure is deemed necessary, conditions have usually been imposed which limit the use of the information only to the litigation and which prevent disclosure to nonparty competitors.

The techniques by which protection has been provided vary as much as the subjects protected. The procedure adopted in Mississippi River has been used on a number of occasions. Nevertheless, it is not the

only available solution. At this juncture, we are uncertain that the examiner gave adequate consideration to whether all the information at issue was entitled to protection and, if so, whether the Mississippi River treatment provides the best available resolution to the opposing interests of [Lehigh] * * * and the third parties. [Footnotes omitted.]

The Commission further stated that "the test to apply to requests for confidential protection of business records and trade secrets is whether public disclosure will cause a clearly defined serious injury," and the Commission noted that one commentator had suggested a number of factors which the hearing examiner should consider in applying this test, e.g., whether disclosure would significantly increase the number of people having knowledge of the "secret"; what value, if any, the information would have to a competitor; the benefits of disclosure; and the alternative means of making disclosure (App. 71). Since the Commission was uncertain whether the hearing examiner had made the necessary evaluation of the facts of the instant case, the Commission, on August 2, 1968, remanded the matter to him for reconsideration in light of the Commission's opinion (App. 68, 70-72).^{9/}

On the remand, the hearing examiner, on September 24, 1968, issued an order in which he: (1) reviewed in detail the prior proceedings; (2) declared that he had "carefully reviewed all of the documents above referred to"; and (3) concluded that the hearing examiner's June 14, 1968 order "must be complied with," and that all information requested by Lehigh must be submitted

^{9/}The Commission noted that, in view of the pending retirement of the former hearing examiner, the parties had agreed that a new hearing examiner should be substituted to hear the case (App. 72).

"without Mississippi River treatment" (App. 72-73). The hearing examiner stated that Lehigh's counsel "has made it abundantly clear that he will not disclose the information supplied," and the examiner cited an earlier case ^{10/}where confidential information requested by a respondent from a third party was protected by ordering independent legal counsel representing the respondent to utilize such information solely for the purpose of defending the adjudicatory proceeding (App. 73). The hearing examiner then ordered that, to assure that Lehigh's counsel will not use the subpoenaed information "for an improper competitive purpose," this information "shall not be disclosed to Lehigh's personnel" (App. 74). The hearing examiner further ordered that Lehigh's counsel should disclose the information to the Commission's complaint counsel "only to the extent that the information is to be used in [Lehigh's] * * * defense"; that copies of the documents submitted by respondents could be made only for purposes of serving as exhibits in the hearing; and that the documents submitted by respondents must be returned to them "promptly following the close of the hearings" (App. 74). Finally, the hearing examiner's order provided that "until further order of this examiner, the information furnished by third parties under

10/F.T.C. v. Lone Star Cement Corporation, D. 8585, Protective Order for third party Atlantic Cement Company, Inc., issued October 28, 1964. The hearing examiner also cited a case (App. 73) where a similar protective method had been employed by a district court. U.S. v. Lever Brothers Company and Monsanto Chemical Company, Civil Action No. 135-219, Protective Order issued April 14, 1961.

the subpoenas is not to be made public" (App. 74).^{11/}

Respondents appealed the hearing examiner's September 24, 1968 order to the Commission, which denied the appeals on November 22, 1968 (App. 75-79).^{12/} The Commission noted that, while the hearing examiner "declined to order the requested Mississippi River

11/ Respondents state (Brief of Appellants, p. 5) that the hearing examiner's September 24, 1968 order was issued "without receiving additional briefs or hearing further oral argument * * *." We note, however, that respondents apparently chose not to file additional briefs, for they could have done so if they so desired; nor did respondents request leave for further oral argument. Respondents had previously filed briefs on the confidentiality question before the hearing examiner and the Commission; their confidentiality argument on this appeal is essentially a rehash of arguments made in those documents, which the second hearing examiner "carefully reviewed" (App. 73,78).

12/ The Commission's decision also rejected similar appeals by other subpoenaed parties. As noted above (p. 3, fn.4), those parties ultimately complied with the specifications of the subpoena (2a-2k) at issue on this appeal.

treatment for the third-party data, the examiner did fashion a protective order which restricted disclosure of the information at issue to [Lehigh's] * * * trial attorneys" (App. 78). The Commission further stated that it appreciated "the serious consequences of unwarranted disclosure of sensitive business information" (App. 78). However, the Commission went on to observe (App. 78-79):

[I]t seems clear to us that the examiner has carefully considered our previous opinion remanding the prior appeals on the identical issues. The examiner's order indicates a thoughtful and workable balancing of the conflicting interests inherent in any such situation. On the one hand, the September 24, 1968, order has provided for the preservation of the requested pretrial discovery information in a manner which respondent finds useful and satisfactory in preparing for cross-examination and for preparation of defense. On the other hand, the order carefully prevents the alleged injuries which might flow from disclosure of the data to Lehigh or to the trade at large by restricting its availability to respondent's counsel alone.

We find that the examiner has carefully attempted to consider the particular facts of this discovery dispute and has tailored a protective order which attempts to fully and fairly balance the potentially conflicting needs of respondent and the third parties. Inasmuch as appellants have failed to present any convincing evidence that the examiner has abused his discretion, we deny the appeals. * * *

The Commission also noted the prematurity of respondents' claim that the hearing examiner's September 24, 1968 order failed to order "in camera treatment for any information introduced" in evidence by Lehigh (App. 78):

* * * There is a possibility that none of the information will be offered into evidence. If [Lehigh] * * * does offer any of the information into evidence, appellants will have every opportunity to urge in camera treatment for the information. Until such

time, the examiner specifically prohibited [Lehigh's] * * * counsel from disclosing any such information to Lehigh, to the trade at large, or to the public.

Respondents thereafter still refused to produce the information called for by specifications 2a-2k of the subpoenas, asserting that the Commission's failure to grant Mississippi River confidential treatment to this information was "unlawful, arbitrary, and capricious" (see App. 81). Lehigh then filed a motion with the hearing examiner, requesting him to certify to the Commission respondents' refusal to produce such information (App. 80-83). Lehigh's motion reiterated that the information "is necessary and essential to [Lehigh's] * * * defensive preparation * * *" (App. 82). The hearing examiner thereafter certified the matter to the Commission, with the recommendation that the Commission take appropriate action to compel respondents' compliance with the subpoenas (App. 85-86).

2. On October 3, 1969, suit was filed on behalf of the Commission under Section 9 of the Federal Trade Commission Act, 15 U.S.C. 49, in the United States District Court for the District of Columbia to compel respondents to comply with specifications 2a-2k of the Commission's subpoenas (App. 2-86). After consolidating the several proceedings, the district court, on December 1, 1969, ordered respondents to fully comply with the subpoenas, subject to the hearing examiner's September 24, 1968 protective order, which the Commission had approved (App. 97-110).

The district court supported its ruling with detailed findings of fact and conclusions of law (App. 97-106). The court

ruled that the subpoenas "meet the standards required for judicial enforcement," since they are "within the authority of the Commission, their specifications are reasonable in scope and sufficiently definite, and the information requested is relevant to the Commission's proceeding" (App. 105). The court noted that "the type of protective order to be entered against disclosure or misuse of confidential information submitted in response to subpoenas rests within the sound discretion of the Commission, and its decision will not be overturned except on a showing that the Commission has abused its discretion" (App. 105). The court ruled that the Commission's approval of a particular method of confidential treatment in Mississippi River, supra, did not preclude it "from permitting other methods of confidential treatment in other cases, so long as the confidential treatment adopted is fair" (App. 105). The court further held that the Commission did not abuse its discretion in approving the confidentiality treatment adopted by the hearing examiner's September 24, 1968 order; and that "Both the examiner and the Commission have sufficiently articulated their reasons for adopting the confidential treatment and the Commission's determination that the examiner's order of September 24, 1968, is a fair balancing of the potentially conflicting needs of Lehigh * * * and respondents' is a reasonable one" (App. 106). Finally, the court stated (App. 106):

The hearing examiner's decision, approved by the Commission, recognizes the need for Lehigh's counsel to use the information and the need to assure that the data will not be used for an "improper competitive purpose." The hearing examiner accommodated these

needs by the prohibition against disclosure to Lehigh personnel and the assurance of Lehigh's independent counsel that they will not disclose the information.

Thereafter, on January 22, 1970, the district court denied respondents' motion for a stay pending appeal (App. 111-114). In denying the stay the court stated (App. 112-113):

[I]t does appear to this Court that the Commission did not abuse its discretion in issuing its order since it did consider the matter fully and it did enter a protective order.

The mere fact that the protective order differed from the protective order that had been entered in another case, in the opinion of this Court does not render the present action an abuse of the discretion of the Commission.

Inasmuch as there is a protective Order. the Court feels that there would not be irreparable harm [or] damage to the respondents in this case * * *.

ARGUMENT

I

THE METHOD OF CONFIDENTIAL TREATMENT EMPLOYED HERE BY THE COMMISSION REPRESENTED A REASONABLE BALANCING OF CONFLICTING INTERESTS AND THEREFORE DID NOT CONSTITUTE AN ABUSE OF ITS DISCRETION.

It is well settled that there is no absolute privilege for trade secrets and other confidential business information, and that such information must be disclosed if the public interest in disclosure outweighs the private interest involved. F.C.C. v. Schreiber, 381 U.S. 279, 290-291, 298-299 (1965). See also F.T.C. v. Tuttle, 244 F.2d 605, 609, 616 (C.A. 2, 1957), certiorari denied, 354 U.S. 925; Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 999 (C.A. 10, 1965), certiorari denied, 380 U.S. 964; Du Pont Powder Co. v. Masland, 244 U.S. 100, 103 (1917); 4 Moore,

Federal Practice ¶ 26.22[3](1968 ed.). It is equally clear that when an administrative agency, like the Federal Trade Commission, balances the conflicting interests, and compels disclosure of confidential business information, subject to defined protective conditions, the administrative decision will be upheld by the courts so long as it is reasonable and does not constitute an abuse of the agency's broad discretion. F.C.C. v. Schreiber, supra, 381 U.S. at 289-292, 298-299. Indeed, it is settled that the selection of a particular protective procedure is a matter committed to agency discretion. In particular, it is the agency's responsibility to choose among alternative protective conditions, and the agency's choice of one protective method, rather than another, will be sustained by the courts if reasonable, and even if the court would have chosen a different method if it had the responsibility for making the choice in the first instance. See F.C.C. v. Schreiber, supra, 381 U.S. at 291, 299; Du Pont Powder Co. v. Masland, supra, 244 U.S. at 103. Compare Moog Industries, Inc. v. F.T.C., 355 U.S. 411, 413 (1958); F.T.C. v. Universal-Rundle Corp., 387 U.S. 244, 249-251 (1967).

In the instant case, the disputed specifications of the subpoenas (2a-2k) request information concerning the financial and contractual relationships between the respondent companies and their cement purchasers (App. 87-89). The Brief of Appellants does not dispute the correctness of the district court's ruling (App. 105) that this information is within the authority of the Commission; that the specifications are reasonable in scope and sufficiently definite; and that the information requested is

reasonably relevant to the Commission's proceeding. It is settled that the courts generally will enforce an administrative subpoena which meets these standards. See Okla. Press Pub. Co. v. Walling, 327 U.S. 186, 208-209 (1946); United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); Civil Aeronautics Board v. Hermann, 353 U.S. 322 (1957); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943); Moore Business Forms, Inc. v. F.T.C. 113 U.S. App. D.C. 231, 232, 307 F.2d 188, 189 (C.A.D.C., 1962); F.T.C. v. Standard American, Inc., 306 F.2d 231, 234-235 (C.A. 3, 1962); Adams v. F.T.C., 296 F.2d 861, 866 (C.A. 8, 1961), certiorari denied, 369 U.S. 864.

Respondents' sole objection to disclosure is apparently their fear that Lehigh may gain an unfair competitive advantage if it learns the individual financial and contractual relationships which exist between each of the respondent companies and their cement purchasers. For this reason, respondents demand that the information be disclosed only to an independent accounting firm for compilation in such a way that the identity of the reporting companies would not be revealed -- in accordance with a method of confidential treatment employed by the Commission in another case, decided almost two years earlier, Mississippi River Fuel Corp., Dkt. No. 8657 (see App. 90-94). However, the independent legal counsel defending the Commission's adjudicatory proceeding against Lehigh have contended that application of the Mississippi River confidentiality method here would unduly restrict their right of cross-examination, and would also inhibit their right of general pre-trial discovery, a right which was provided by the

1967 Amendments to the Commission's Rules of Practice for Adjudicative Proceedings, 32 Fed. Reg. 8452(Rule 3.34(b)(2))(App.69).

The district court was plainly correct in ruling that the hearing examiner and the Commission balanced the conflicting claims of Lehigh and respondents in a fair and reasonable manner. On the one hand, the administrative decision protects Lehigh's right to cross-examination and general discovery by permitting Lehigh's independent legal counsel to obtain access to the business information which they need. See Covey Oil Co. v. Continental Oil Co., supra, 340 F.2d at 999: "Inconvenience to third parties may be outweighed by the public interest in seeking the truth in every litigated case." On the other hand, the administrative decision reasonably protects respondents against improper disclosure to Lehigh. For it provides that Lehigh's independent legal counsel may only use the information to defend the adjudicatory proceeding against Lehigh, and that they may not disclose the information to Lehigh's personnel (App. 73-74). The hearing examiner, thus, credited the bona fides of the stipulation of Lehigh's independent legal counsel that they will not disclose the information to Lehigh's personnel (App. 73; App. 35-36).

In short, under the administrative decision, respondents have reasonable assurance that enforcement of the Commission's subpoenas will not result in the harm which they fear, viz., the disclosure to Lehigh's personnel of the individual financial and contractual relationships between each of the respondent companies and their cement purchasers. Certainly, it cannot be contended that the hearing examiner and the Commission abused

their discretion in relying upon the assurances of Lehigh's independent legal counsel, that they will not disclose the information to Lehigh's personnel.^{13/}

As just seen, respondents have adequate assurances against the disclosure of the confidential information to Lehigh's personnel. Lehigh's independent legal counsel may, of course, at some future time, seek permission to place the information in evidence. In that eventuality, as the Commission noted, respondents "will have every opportunity to urge in camera treatment for the information. Until such time, the examiner specifically prohibited [Lehigh's] * * * counsel from disclosing any such information to Lehigh, to the trade at large, or to the public" (App. 78).^{14/} Moreover, if Lehigh's independent legal counsel should seek to place the information in evidence, and if respondents should urge in camera treatment for the information, the hearing examiner and the Commission will have the responsibility of determining, at

^{13/} In a number of cases, the courts have limited disclosure of information obtained by discovery to counsel for the inquiring party and such employees of the party as were assisting counsel in the litigation. See cases cited in 4 Moore, Federal Practice, ¶26.22[3], p. 1292, fn. 6 (1968 ed. and 1969 Supp.). See also N.L.R.B. v. Friedman, 352 F.2d 545, 548 (C.A. 3, 1965): "We cannot presume that the General Counsel or the experts subject to his direction will act unlawfully or in disregard of the order of the district court." And see Gellhorn, "The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices," 36 U.Chl.L. Rev. 113, 168-169, fn. 242 (1968): " * * * counsel's professional statement seems sufficient."

^{14/} Lehigh's independent legal counsel has stipulated that they will not oppose an appropriate request by respondents for in camera treatment of the subpoenaed information (App. 36).

that time, whether respondents' need for confidentiality outweighs the public interest in disclosure of the information. See 16 C.F.R. 3.45(1969). See also F.T.C. v. Tuttle, supra, 244 F.2d at 609, 616; Covey Oil Co. v. Continental Oil Co., supra, 340 F.2d at 999.^{15/}

The Brief of Appellants does not appear to contend that the hearing examiner and the Commission abused their discretion in relying upon the good faith and assurances of Lehigh's independent legal counsel that they will not disclose the information to Lehigh's personnel. Rather, respondents ask this Court to sustain their refusal to produce the subpoenaed information on the assumption that if, at some future time, Lehigh's independent legal counsel seek to place the information in evidence, the hearing examiner and the Commission will improvidently reject respondents' request for in camera treatment (Brief of Appellants, p. 17). But the lack of substance in respondents' position is underscored by the Supreme Court's decision in F.C.C. v. Schreiber, supra, 381 U.S. 279.

^{15/}The administrative decision also provides that Lehigh's independent legal counsel may disclose the information to the Commission's complaint counsel "only to the extent that the information is to be used in [Lehigh's] * * * defense" (App. 74). This provision is in accord with the Commission's general practice of requiring counsel to advance to opposing counsel material which will be introduced in evidence. 16 C.F.R. 3.21(a)(6)(1969). Of course, the administrative decision also provides that the Commission's complaint counsel may not make the information public unless the hearing examiner authorizes public disclosure (App. 74). And the Commission employees are subject to heavy penalties if they disclose confidential information without prior Commission or court approval. 15 U.S.C. 50.

In Schreiber, a subpoena issued by the Federal Communications Commission required respondent to testify and produce various documents relating to practices in the television industry. The district court granted the Commission's petition for enforcement of its subpoena and orders, but "to preclude disclosure of trade secrets of which [respondent's] competitors might take advantage" ordered that the material be received and held in confidence, and that the Commission would have to move the court, upon good cause, for an order permitting such documents to be made public. 381 U.S. at 286-287. The court of appeals affirmed on the ground that the district court did not abuse its discretion in establishing these protective conditions. 381 U.S. at 288. However, the Supreme Court, accepting the arguments of the Government, unanimously reversed. In an opinion by Chief Justice Warren, the Court held that "The question for decision was whether the exercise of discretion by the Commission was within permissible limits, not whether the District Judge's substituted judgment was reasonable." 381 U.S. at 291 (emphasis in original). The Court further held that it would not assume in advance that the Commission would improvidently reject respondent's request for in camera treatment (381 U.S. at 296):

The only possible basis for the District Court's order would be an assumption that the Presiding Officer would consistently require disclosure even if a balancing of public and private interests compelled secrecy. There is no support for such an assumption in the record and it runs contrary to the presumption to which administrative agencies are entitled -- that they will act properly and according to law.

The Court also emphasized that the district court's order was contrary to the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." 381 U.S. at 296-297.^{16/}

Similarly, here, there is no basis in the record for the assumption that the hearing examiner and the Federal Trade Commission will improvidently reject respondents' request for in camera treatment of the subpoenaed information if and when such an issue is presented to them. Moreover, until such time as that issue is presented for administrative consideration, if it ever is, respondents' contention is plainly premature.

II

THE COMMISSION, BY ITS ADOPTION OF A DIFFERENT METHOD OF CONFIDENTIAL TREATMENT IN MISSISSIPPI RIVER, ALMOST TWO YEARS AGO, WAS NOT PRECLUDED FROM ADOPTING THE REASONABLE METHOD OF CONFIDENTIAL TREATMENT EMPLOYED HERE.

As just seen, the method of confidential treatment employed here by the Commission represented a reasonable balancing of conflicting interests and therefore did not constitute an abuse of its discretion. It is equally clear that the Commission's adoption of a different method of confidential treatment in Mississippi River, supra, decided almost two years earlier, did not preclude the Commission from adopting the reasonable method of confidential treatment employed here.

^{16/} See also F.T.C. v. Green, 252 F.Supp. 153, 157 (S.D.N.Y., 1966); Covey Oil Co. v. Continental Oil Co., supra, 340 F.2d at 999.

The Supreme Court's decision in F.C.C. v. WOKO, 329 U.S. 223 (1946), is closely in point. In WOKO, the Federal Communications Commission refused to renew a radio license because of misrepresentations in the original license application. The applicant claimed that "the present case constitutes a departure from the course which the Commission has taken in dealing with misstatements and applications in other cases"; and that "deceptions of this character have not been uncommon and * * * they have not been dealt with so severely as in this case." 329 U.S. at 227-228. These contentions, however, were rejected by the Supreme Court, which declared, in an opinion written by Mr. Justice Jackson (329 U.S. at 228):

The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable. [Emphasis added.] 17/

Similarly, here, the Federal Trade Commission is not bound to deal with the instant case in the same manner as it dealt with Mississippi River, a case decided almost two years earlier, which respondents claim is comparable.

17/See also Georgia Comm. v. United States, 283 U.S. 765, 775 (1931) (Brandeis, J.) ("It is not our province to enquire into * * * the consistency of its [the ICC's] conclusion with those reached in similar cases"); Virginian Ry. v. United States, 272 U.S. 658, 665-666 (1926) (Brandeis, J.) ("This Court has no concern with * * * the alleged inconsistency with findings made in other proceedings before it [the ICC]"); Western Chem. Co. v. United States, 271 U.S. 268, 271 (1926) (Brandeis, J.) (The Court has "no occasion" to consider whether the ICC's decision is "inconsistent with conclusions reached by it in similar cases * * *").

The WOKO principle has been consistently followed by this Court and by other courts of appeals. Thus, in Giant Food, Inc. v. F.T.C., 116 U.S. App. D.C. 227,233, 322 F.2d 977, 983 (1963), certiorari dismissed, 376 U.S. 967, this Court recognized that "an administrative agency is not 'bound * * * to deal with all cases at all times as it has dealt with some that seem comparable." Similarly, in James S. Rivers, Inc., (WJAZ) v. F.C.C., 122 U.S. App. D.C. 29, 351 F.2d 194 (1965), this Court sustained the refusal of the Federal Communications Commission to waive one of its rules for authorizing nighttime radio service, notwithstanding petitioner's complaint that "the Commission has granted waivers in cases comparable to this one." 351 F.2d at 196, fn. 3. The Court held (ibid.):

In the first place, comparability in this area is an inexact concept at best; and, secondly, the Commission is to be accorded substantial latitude in the continuing administration of a rule such as is here involved, where trial and error is to some extent inevitable. The Supreme Court has said that the Commission is not obliged "to deal with all cases at all times as it has dealt with some that seem comparable." FCC v. WOKO, Inc., 329 U.S. 223, 228 * * *. And this court has referred to the necessarily "pragmatic" nature of the Commission's approach to each requested waiver * * *, as well as to the inescapable fact that "the Commission's view of what is best in the public interest may change from time to time." * * *

Most recently, in Capital International Airways, Inc. v. C.A.B., 129 U.S. App. D.C. 187, 392 F.2d 511 (1968), this Court sustained an order of the Civil Aeronautics Board directing a carrier to cease and desist from certain unlawful practices, notwithstanding the carrier's enumeration of "cases in which the Board declined to take enforcement action for varying reasons, including lack

of a continuing course of misconduct and a good faith action on advice of counsel." 392 F.2d at 515. The Court held (ibid.):

The short answer to this argument, is, of course, that absent a showing of abuse of discretion, it is the Board's sole responsibility to decide upon the appropriate action and remedy in individual cases.

See also William N. Feinstein & Co. v. United States, 317 F.2d 509, 512(C.A. 2, 1963), where Judge (now Mr. Justice) Marshall held:

* * * [P]laintiff contends that the decision of the Commission should be set aside as arbitrary and capricious because of its alleged inconsistency with the Commission's earlier decision at 298 I.C.C. 637 (1956). This contention is not sustainable; the mere fact of inconsistency with a prior decision, even assuming such inconsistency had been demonstrated, is not a valid basis for setting aside the later decision of an administrative agency. Cf. Federal Communications Commission v. WOKO, Inc., 329 U.S. 223 * * *. In proceedings of this kind, a court reviews no more than the particular administrative order which the plaintiff has challenged and seeks to determine only whether the record in the case before it contains substantial evidence to support the findings upon which the order is based. * * *. Because the record in a given prior proceeding is not before the court, any comparison of the kind which plaintiff seeks to have us make between an earlier and a later agency decision is neither possible nor appropriate. * * * [Emphasis added.]

Accord: 2 Davis, Administrative Law, Section 17.07 (1958 ed.); Shawmut Ass'n. v. S.E.C., 146 F.2d 791, 796-797 (C.A. 1, 1945).

Application of the WOKO principle is particularly appropriate in a case, like the present case, where the administrative function is to make a discretionary determination, on the facts of the case before it, of the most appropriate means of balancing the conflicting interests in that particular case. "Comparability in this area" is certainly "an inexact concept at best": and the Commission must surely be "accorded substantial latitude" in its

"pragmatic" balancing, from case to case, of the conflicting interests involved. See James S. Rivers, Inc., (WJAZ) v. F.C.C., supra, 351 F.2d at 196, fn. 3. Moreover, since the administrative determination is so closely related to the facts of the particular case, a comparability test would be "neither possible nor appropriate," for neither the Commission, the hearing examiner, nor the courts on judicial review, can be expected to search out the record in other cases. See William N. Feinstein & Co. v. United States, supra, 317 F.2d at 512. It should also be emphasized that respondents cannot claim that the Commission has been unfair in that it departed from a settled principle of substantive law, upon which they relied in formulating their business relationships.^{18/}

^{18/} In Dixie Highway Express, Inc. v. United States, 268 F.Supp. 239 (S.D. Mass., 1967) (three-judge court) (Brief of Appellants, p.15), the court stated that the Interstate Commerce Commission could not "disregard and depart from well established and deep-rooted policies and practices which appear as rules of property belonging to franchise holders as muniments of title to such valuable property rights." 268 F.Supp. at 241-242. The court concluded that the Commission's departure from the established "principle of law" violated plaintiffs' "vested property" and "due process" rights. Ibid. In reversing, the Supreme Court simply held that the "principle of law" discerned by the lower court was non-existent. 389 U.S. 409.

In N.L.R.B. v. Mall Tool Co., 119 F.2d 700 (C.A.7, 1941) (Brief of Appellants, p. 15), the court held that discharged employees were entitled to back pay dating from the date of filing their unfair labor practice claims, and not from the date of discharge, where there was an unexplained delay in the filing of claims. The court's opinion contains language about "consistency" of administrative decisions, which was repeated by the court of appeals in WOKO, Inc. v. F.C.C., 153 F.2d 623, 631. However, the Supreme Court in WOKO reversed the court of appeals' decision, holding that "we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable." 329 U.S. at 228. The Mall Tool decision is questioned in 2 Davis, Administrative Law, Section 17.07, pp. 529-530 (1958 ed.).

Respondents' sole legal right is that the Commission should, based on the facts of this case, fairly and reasonably balance their claim of confidentiality against the public interest in disclosure. As seen above (Point I), this is exactly what the Commission did here.

Finally, although it is not necessary to do so, we note that respondents are in error when they claim (Brief of Appellants, pp. 1,4, 10-11, 14) that this case is factually identical to Mississippi River, supra. On the contrary, there are a number of significant differences between the two cases.

In Mississippi River, the hearing examiner issued subpoenas against third-party competitors of Mississippi River Fuel Corporation, a cement manufacturer, whose acquisitions of cement purchasers had been challenged by the Commission. The hearing examiner's order permitted Mississippi River's legal counsel (one of whom was house counsel) to disclose the information to Mississippi River's personnel if necessary for the defense of the adjudicatory proceeding. The subpoenaed parties appealed to the Commission, contending that Mississippi River's "real purpose is to gather highly confidential competitive data * * *" (see App. 92). In view of that allegation, and "out of an abundance of caution and to avoid any possibility that the allegedly confidential data will be improperly used * * *", the Commission, employing a novel protective technique,^{19/} directed that the information be submitted to a

^{19/}While this technique had been used in some district court cases (see App. 71), we know of no pre-Mississippi River case where the technique was used by the Commission.

reputable and disinterested accounting firm, for compilation in such a manner that no individual company's confidential arrangements or data would be revealed (App. 92-93).

In the instant case, in contrast to Mississippi River, counsel defending the Commission's adjudicatory proceeding on behalf of Lehigh are all independent; none is house counsel. Moreover, here, unlike Mississippi River, the hearing examiner's order does not permit Lehigh's independent legal counsel to disclose the information to Lehigh's personnel in order to assist in the defense of the proceeding; there is an absolute ban against disclosure to Lehigh's personnel. Nor is there present in the instant case any contention, like that made in Mississippi River, that Lehigh's "real purpose" is to gain an unfair competitive advantage. Indeed, the existence of such an improper motive here is effectively dispelled by the stipulation of Lehigh's independent legal counsel that they will use the subpoenaed information only in connection with the defense of the adjudicatory proceeding, and that this information "will be kept strictly confidential" for use only by independent legal counsel, or by Lehigh's "technical experts not regularly employed" by it (App. 35). The hearing examiner accepted the bona fides of that stipulation, for his September 24, 1968 order specifically noted that Lehigh's counsel "has made it abundantly clear that he will not disclose the information supplied" (App. 73). No such stipulation was entered into in the Mississippi River case. It is also noteworthy that, subsequent to the Mississippi

River decision, the Commission, in June 1967, amended its Rules of Practice for Adjudicative Proceedings to liberalize a respondent's right to general pre-trial discovery, a right which Lehigh has properly invoked in the instant case. Compare 32 Fed. Reg. 8452 (Rule 3.34(b)(2)) (June 1967) with 28 Fed. Reg. 7088,7089 (Rules 3.10, 3.17)(July 1963). The hearing examiner's June 14, 1968 order in the instant case specifically noted that the Mississippi River confidentiality method would "impair quite substantially" Lehigh's right to cross-examination and its right to general pre-trial discovery, which was accorded by the 1967 Amendments (App. 40).

It need only be added that the present case and Mississippi River (decided almost two years apart) involve different parties, different markets, and different legal counsel, and that the hearing examiner in the present case had to evaluate the individual record in the case before him, and not some other case before a different hearing examiner. There is no merit in respondents' contention that the facts of the instant case necessarily required the identical protective conditions employed in another case.

III

THE COMMISSION AND THE HEARING EXAMINER
CLEARLY ARTICULATED THEIR REASONS FOR THE
METHOD OF CONFIDENTIAL TREATMENT EMPLOYED
HERE.

We now demonstrate, finally, that the Federal Trade Commission and the hearing examiner clearly articulated their reasons for the method of confidential treatment employed here and that there is no substance in respondents' attack (Brief of Appellants,

Point I) on the adequacy of the administrative explanation of its decision.

In its first opinion in this case, the Commission explained that the type of protective order to be entered depends upon a balancing of the conflicting interests involved in each case (App. 70). In particular, the Commission stated, the hearing examiner, "because of his proximity to the case," is in the best position "to assess the multitude of variables inherent in the delicate balancing of interests between the respondent's need to know sensitive information and the third party's need to protect the same valuable information from his competitor" (ibid.). The Commission further pointed out that there are a number of protective techniques which a hearing examiner may adopt, including the method employed in Mississippi River; but that the Commission merely held in Mississippi River that this device was "appropriate" under "the facts of that proceeding", and that the Mississippi River decision "neither stated nor implied that henceforth such treatment was to be mandatory" (App. 70-71). The Commission remanded the matter to the hearing examiner to consider "whether the Mississippi River treatment provides the best available resolution to the opposing interests of [Lehigh] * * * and the third parties" (App. 70-72).

The hearing examiner, on the remand, "carefully reviewed" the prior proceedings in the case, including the written briefs submitted by respondents and Lehigh, and concluded that the first examiner's order enforcing the subpoenas "must be complied

with * * * without Mississippi River treatment" (App. 73). The basis for this ruling was plainly the hearing examiner's finding that Mississippi River treatment was not necessary to protect respondents' confidentiality needs since: (1) Lehigh's stipulations made it "abundantly clear that [Lehigh's independent legal counsel] * * * will not disclose the information supplied"; and (2) the protective conditions spelled out in the order, which were even more stringent than those in other cases cited by the examiner, would assuredly prevent Lehigh from using the information "for an improper competitive purpose * * *" (App. 73-74). In short, the hearing examiner, on the remand, balanced the conflicting interests asserted by respondents and Lehigh, and it was his judgment that, on the facts before him, Mississippi River treatment was not called for.

The Commission thereafter denied respondents' appeals from the hearing examiner's order (App. 75-79). The Commission noted that, while the examiner "declined to order the requested Mississippi River treatment," he did "fashion a protective order," based on his evaluation of "the particular facts of this discovery proceeding," which indicated a "thoughtful and workable balancing of the conflicting interests * * *" (App. 78-79). Thus, the Commission noted, the examiner ordered enforcement of the subpoenas "in a manner which [Lehigh] * * * finds useful and satisfactory in preparing for cross-examination and for preparation of defense," but he also "carefully prevent[ed] * * * the alleged injuries which might flow from disclosure of the data to Lehigh or to the trade at large by restricting its availability

to [Lehigh's] * * * counsel alone" (ibid.). Since respondents had not demonstrated any abuse of discretion by the hearing examiner, the Commission denied the appeals (App. 79).^{20/}

As just seen, both the hearing examiner and the Commission clearly articulated their reasons for the method of confidential treatment employed here, rather than the Mississippi River treatment. We also note that in Matter of Koppers Company, Inc., Dkt. No. 8755, the Commission gave a similar explanation of its reasons for refusing to interfere with the discretion of a hearing examiner who adopted a protective method similar to that followed here, rather than Mississippi River treatment (Commission opinions of November 1, 1968, p. 6, and January 15, 1969, pp. 2-3).^{21/} In a judicial enforcement action in Koppers, the district court rejected the contention that the Commission erred in not ordering Mississippi River treatment. F.T.C. v. United States Pipe and Foundry Company, Civil Action No. 1500-69 (D.D.C., decision filed October 3, 1969).

^{20/} The Commission's position that it will affirm the examiner's order "unless it is shown that he has abused his discretion" has been described by one commentator as "eminently sensible." Gellhorn, supra, 36 U. Chi. L. Rev. at 179.

^{21/} The Brief of Appellants mistakenly asserts (p. 16) that the Commission in Koppers "affirmed an order of one of its examiners granting Mississippi River treatment in a case pending before him." Actually, the hearing examiner in Koppers employed a confidentiality method similar to that adopted in the instant case.

In F.T.C. v. Continental Can Co., 267 F.Supp. 713, 716 (S.D. N.Y., 1967) (Brief of Appellants, p. 17), the court, in requesting counsel to stipulate to the protective conditions, noted that "if desired" the Mississippi River procedure "may be used." Later, the court entered an order, based on counsel's stipulation, which adopted the confidentiality method employed here (Order of August 10, 1967).

Since the hearing examiner and the Commission did clearly articulate their reasons for the method of confidential treatment employed here, rather than Mississippi River treatment, it follows that the cases cited by respondents are inapposite. For example, in Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962)(Brief of Appellants, pp. 9,10,13), the Interstate Commerce Commission found that a labor dispute had caused serious inadequacies of carrier service, and to remedy this deficiency the Commission granted a carrier the right to furnish additional service. The Supreme Court stated that this "sweeping relief of certification" could have serious adverse effects on "the functioning of the national labor relations policy," and that the choice of this remedy would appear to be "improvident" absent "a compelling justification" for employing "the more precise and narrowly drawn cease-and-desist order remedy * * *" (371 U.S. at 172-174). The Court also noted that the Commission's choice of the certification remedy seemed to have been "automatic"; and that it "made no findings specifically addressed to the choice between two vastly different remedies with vastly different consequences to the carriers and the public. Nor did it articulate any rational connection between the facts found and the choice made." 371 U.S. at 166,168. The Court, therefore, remanded the matter to the Commission to make the necessary findings. By contrast, in the instant case, the hearing examiner and the Commission did articulate their reasons for adopting the confidentiality method employed here, rather than the Mississippi River method. Thus Burlington

and other similar cases cited by respondents, have no application
here.^{22/}

^{22/} In S.E.C. v. Chenery Corp., 318 U.S. 80 (1943) (Brief of Appellants, pp. 7, 10), the Court held that it could not sustain a decision of the Securities and Exchange Commission on the theory that the Commission had formulated a new general standard of conduct derived from the Public Utility Holding Company Act, where no such theory had been relied upon by the Commission at the administrative level. The Court remanded the matter to the Commission to afford it an opportunity to determine, in the exercise of its discretion, whether to adopt the new standard of conduct. By contrast, in the instant case, the considerations which we rely upon to support the administrative decision were clearly stated by the hearing examiner and the Commission.

In Greensboro-High Point Authority v. C.A.B., 97 U.S. App. D.C. 358, 231 F.2d 517 (C.A.D.C., 1956), the Civil Aeronautics Board's certification of additional air carrier service had the effect, according to petitioner, of discriminating against it in violation of Section 404 of the Civil Aeronautics Act, 49 U.S.C. 484. The Commission, however, failed to explicitly address itself to this "discrimination" charge. The Court, consequently, remanded the matter to the Commission so that it might consider whether petitioner's statutory, substantive, right not to be discriminated against, had been violated. By contrast, in the instant case, the hearing examiner and the Commission have considered and rejected respondents' claim that Mississippi River treatment should be employed. Moreover, unlike High Point, where petitioner had a statutory right not to be discriminated against, respondents do not have any legal right to have the Commission follow the Mississippi River treatment (see Point II, *supra*).

In In re United Corp., 249 F.2d 168, 180-181 (C.A. 3, 1957) (Brief of Appellants, pp. 13-14), the court set aside an order of the Securities and Exchange Commission which awarded \$50,000 to counsel in a reorganization proceeding without setting forth "the basis of its allowance" or "any standard or method of valuation" of counsel's services or disbursements. Similarly, in State Corporation Commission v. F.P.C., 206 F.2d 690, 723 (C.A. 8, 1953), certiorari denied, 346 U.S. 922 (Brief of Appellants, p. 14), the court stated that the Federal Power Commission had failed to give a sufficient explanation for its "conclusion" that a 5 1/2% rate of return was "just and reasonable" and that the Commission's decision nowhere mentioned voluminous pertinent testimony. The court, therefore, remanded the matter to the Commission for the necessary findings and reasons. Neither In re United Corp., nor State Corporation Commission has any application here, since the hearing examiner and the Federal Trade Commission did articulate their reasons for the method of confidential treatment employed here.

It is true that neither the hearing examiner nor the Commission undertook to distinguish in detail the facts of the instant case from the facts of Mississippi River.^{23/} But no such exercise was necessary. The sole function of an administrative agency, when a question of confidentiality is raised with respect to a subpoena, is to fairly and reasonably balance the confidentiality claim against the public interest in disclosure (supra, pp.13, et seq). Similarly, if the agency did undertake a reasonable balancing of the conflicting interests in the case before it, the court, in a judicial proceeding to enforce the subpoena, should sustain the agency's action without regard to an alleged inconsistency between the result in that case and some earlier case, decided on the basis of a different record. See F.C.C. v. WOKO, supra, 329 U.S. at 228, and other cases cited supra, pp. 22-23. We submit, in short, that this Court should affirm the administrative action in this case on the basis of our demonstration (Point I, supra) that the hearing examiner and the Commission did reasonably balance the conflicting interests in this case and that they did not abuse their broad discretion. Respondents' "comparability" claims are wholly irrelevant. As Judge Magruder held in M. & M. Transportation Co. v. United
^{23/}Although not necessary to do so, we demonstrated above (pp.25-27) that the cases are in fact distinguishable.

States, 128 F.Supp. 296, 301 (D. Mass., 1955)(three-judge court), affirmed, 350 U.S. 857:

The courts have many times held that the findings of the [Interstate Commerce] Commission may not be attacked because they are inconsistent with findings made in other cases. * * * Where, as in the instant case, the findings are on their face adequate and explain the basis for decision, there is no occasion to examine consistency with prior decisions. 24/

Accord: Bell Lines, Inc. v. United States, 263 F.Supp. 40, 44 (S.D. W.Va., 1967)(three-judge court)(Christie, D.J.) ("* * * the [Interstate Commerce] Commission need not explain a decision's inconsistency with prior decisions (when their findings are

24/ Judge Magruder also pointed out (128 F.Supp. at 301) that "prior decisional norms" were deemed relevant in Sec'y of Agriculture v. United States, 347 U.S. 645 (1954)(Brief of Appellants, p. 12), only insofar as the Supreme Court could not otherwise understand the administrative decision, whose "legal basis" was unclear. Similarly, in N.L.R.B. v. Metropolitan Ins. Co., 380 U.S. 438 (1965)(Brief of Appellants, pp. 10, 12), the Court remanded the matter to the agency where judicial review was impossible because the administrative decision (which was inconsistent with other decisions) could not be understood. By contrast, in the instant case, the basis for the administrative decision is clear, for both the hearing examiner and the Commission have articulated their reasons for the method of confidential treatment employed here, rather than Mississippi River treatment. Unlike Sec'y of Agriculture, supra, and Metropolitan Ins. Co., supra, the instant case does not involve an administrative formulation of a principle of substantive law, upon which parties rely in formulating their business relationships. Rather, here, the agency is simply concerned with a discretionary balancing of conflicting interests on the basis of the facts of the particular case. "Comparability" between cases in such an area is not relevant to understanding the basis for the administrative decision. The foregoing considerations also distinguish HC & D Moving & Storage Co. v. United States, 298 F.Supp. 746 (D. Hawaii, 1969)(three-judge court) and T.I. McCormack Trucking Co. v. United States, 251 F.Supp. 526 (D.N.J., 1966)(three-judge court)(Brief of Appellants, p. 15).

adequate and explain the basis) in order for it to be upheld * * *").

CONCLUSION

For the foregoing reasons, the order of the district court enforcing the subpoenas should be affirmed.

Respectfully submitted,

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MARCH 1970.